

No. 14975

United States
Court of Appeals
for the Ninth Circuit

NATIONAL VAN LINES, INC., a corporation,
Appellant,

vs.

ALFRED E. DEAN, trading under the firm name
and style of National Transfer & Storage Co.,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

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PAUL P. O'BRIEN, CLERK



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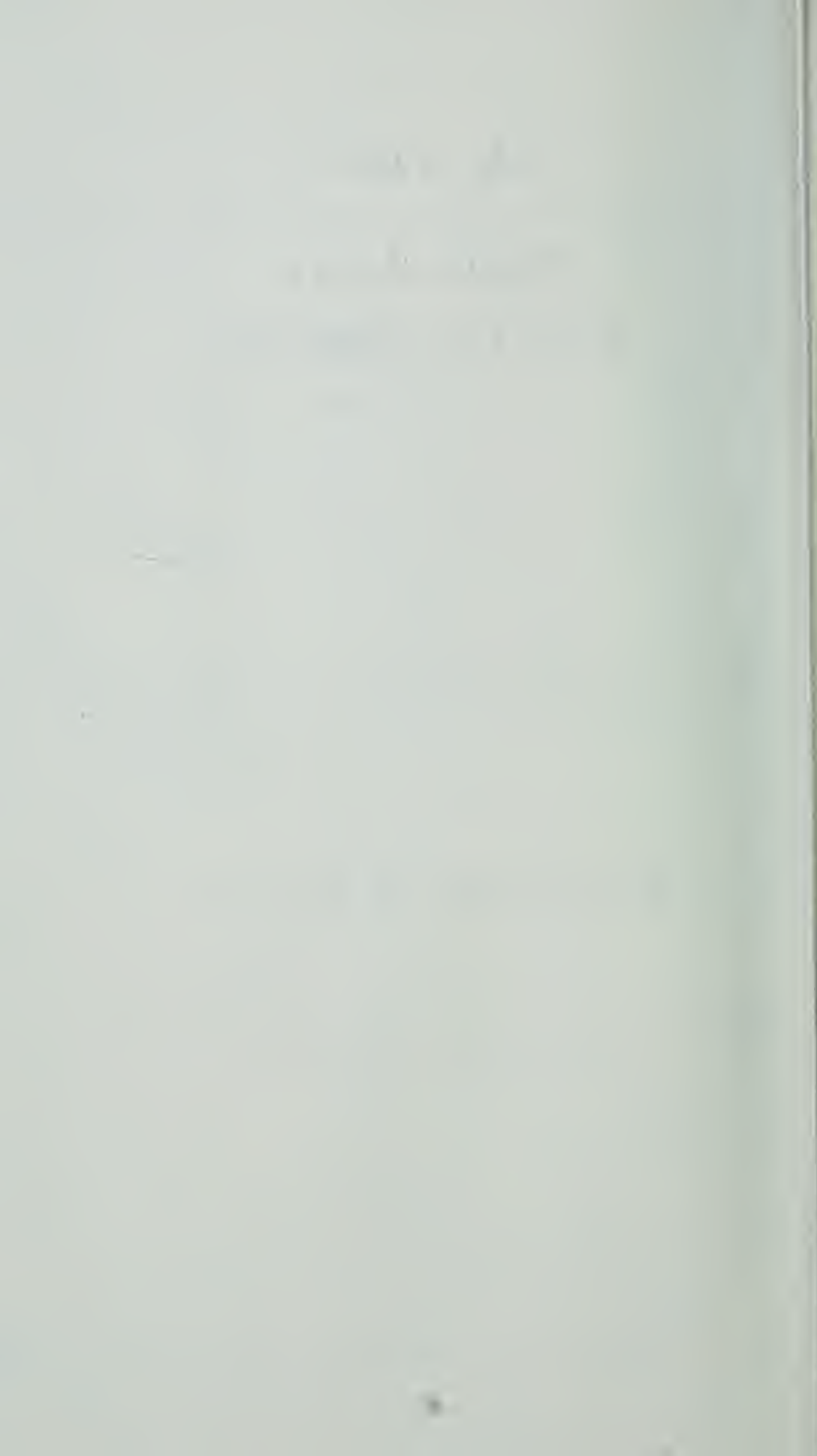
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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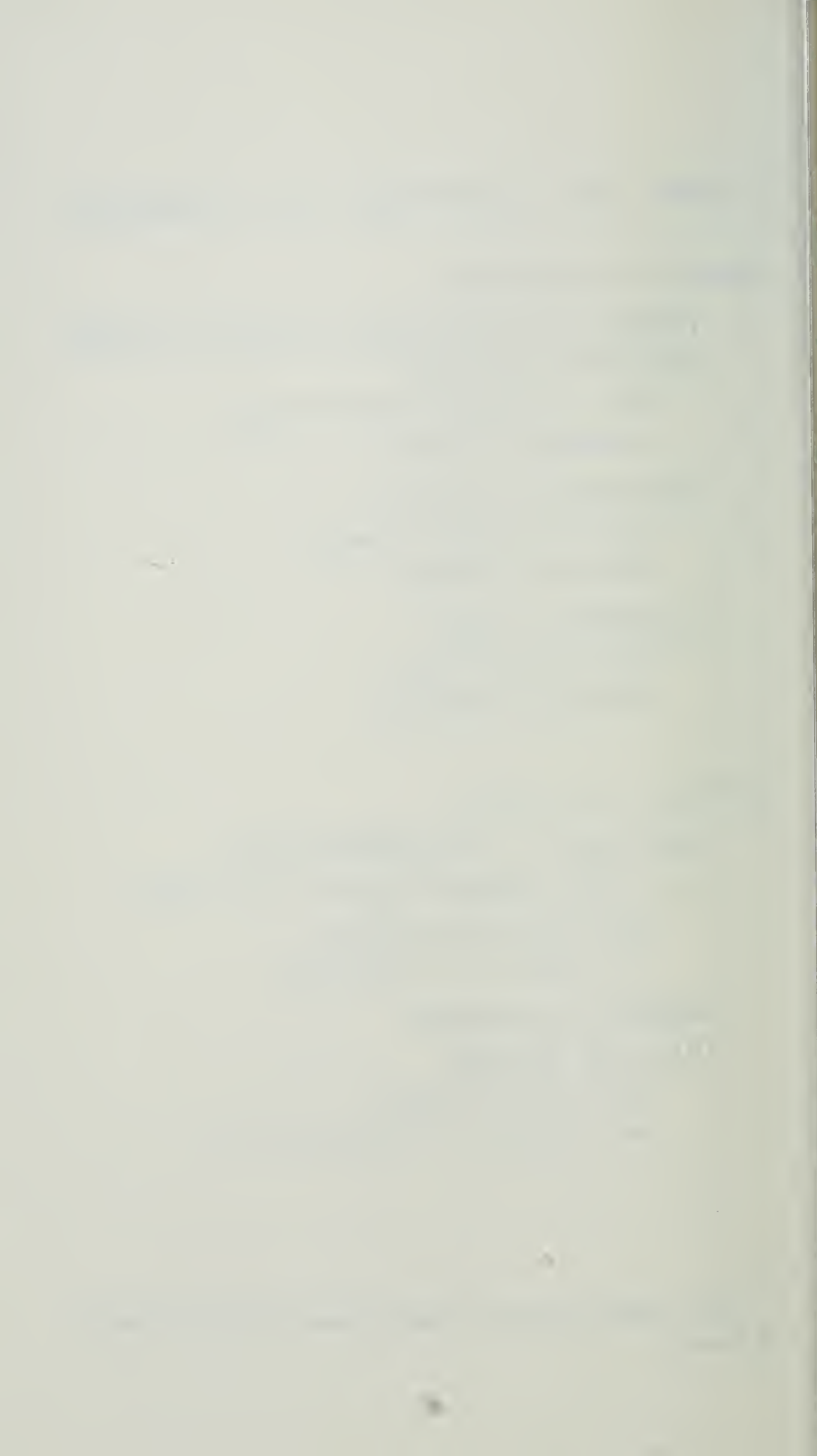
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* Page numbers appearing at foot of page of original Transcript of Record.



In the United States District Court for the Southern District of California, Central Division

Civil Action No. 14783-T

NATIONAL VAN LINES, INC., Plaintiff,

vs.

ALFRED E. DEAN, trading under the firm name and style of National Transfer & Storage Co.,
Defendant.

COMPLAINT

To the Honorable Judges of the United States District Court for the Southern District of California, Central Division:

1. Plaintiff, National Van Lines, Inc., is a corporation organized and existing under the laws of the State of Illinois, having its principal place of business at 2431 Irving Park Road, Chicago 18, Illinois.

2. Defendant, Alfred E. Dean, is an individual doing business under the name and style of National Transfer & Storage Co., having its principal office and place of business at 4161 Pacific Highway, San Diego, California and within the jurisdiction of this court.

3. This action is brought for breach of contract and for service mark infringement under the Trade Mark Laws of the United States and also for unfair competition in trade. The parties hereto are citizens of different states, and the amount involved,

exclusive of interest and costs exceeds the sum of Three Thousand Dollars (\$3,000.00.) [2]

4. Plaintiff is now and has for many years past continuously engaged in the business of the transportation of goods and particularly household goods by motor van in interstate commerce and including the State of California and within the jurisdiction of this court.

5. On or about October, 1928, plaintiff's predecessor, National Shippers and Movers, Inc., then a corporation of Illinois having a place of business at Chicago, Illinois adopted and used the word National as a service mark for the transportation of household goods by motor van.

6. On June 21, 1934 plaintiff company was incorporated in the State of Illinois and at that time acquired all of the assets of National Shippers and Movers, Inc. including the service mark National and all the good will of the business connected therewith and since that date has continuously used the service mark National for the transportation of goods by motor van.

7. That on or about June 21, 1934 plaintiff devised and adopted a design dominated by a plurality of wide, vertically disposed, laterally spaced apart red stripes to be used with the service mark National, and has since that date continuously used this design as a service mark for the transportation of goods by motor van.

8. On September 11, 1951 plaintiff National Van Lines, Inc. registered on the Principal Register of

the United States Patent Office under the Trade Mark Act of 1946 the service mark National and design constituting a shield background under Service Mark Registration No. 548,018 which covers the service of the transportation of goods by motor van. The shield background is red, white, and blue and is dominated by a plurality of wide, vertically disposed, laterally spaced apart red stripes. On September 9, [3] 1952, plaintiff National Van Lines, Inc. registered on the Principal Register of the United States Patent Office under the Trade Mark Act of 1946 the service mark National under Service Mark Registration No. 563,950 which covers the service of the transportation of goods by motor van.

Copies of these service mark registrations National and design and National are annexed hereto as Plaintiff's Exhibits Nos. 1 and 2. Certified copies of these registrations will be produced at the trial. Plaintiff is still the owner of said service marks and the registrations therefor, which are valid and subsisting, unrevoked, and uncanceled. Said service marks are of great value to plaintiff.

9. On or about November 7, 1944, plaintiff and defendant entered into an agreement whereby plaintiff authorized defendant to act as its sales agent. Pursuant to said agreement, defendant was licensed to use plaintiff's service mark National and design under certain conditions and limitations. Said agreement specifically provided that upon termination thereof, all rights and privileges enjoyed by defendant as a result of such agreement would forthwith terminate and specifically, defendant

would be prohibited from further using plaintiff's service marks.

10. Pursuant to said agreement entered into on November 7, 1944 between the parties, defendant operated thereunder and in accordance with the terms of said agreement until February 20, 1950, at which time the agreement was completely terminated. A copy of said agreement is attached hereto as Plaintiff's Exhibit No. 3 and made a part hereof.

11. Notwithstanding the termination of said agreement entered into on November 7, 1944 between the parties, defendant since the termination of this agreement on February 20, 1950 did continue and is presently continuing to employ plaintiff's service marks, contrary to the provisions of said agreement. Plaintiff has repeatedly advised defendant of the violation of plaintiff's rights and the wrongful use of its service marks. Notwithstanding such notice, defendant persists in the wrongful use of said marks.

12. Notwithstanding plaintiff's well-known and established rights in its service marks, defendant has in the San Diego, California territory and elsewhere continued to engage in the business of shipping household goods by motor van under the trade name of National Transfer & Storage Co. and has continued to use the service mark National and close imitations of plaintiff's service mark comprising a shield with dominant vertically disposed, laterally spaced apart red stripes and has offered for sale and has sold such services comprising the movement of household goods by motor van under

said service marks in competition with plaintiff and has deceived and continues to deceive the public into believing that its services are in fact plaintiff's services, and defendant threatens to continue such unfair competition and infringement all to plaintiff's irreparable injury and loss unless restrained by this court. [5]

13. Defendant with full knowledge of plaintiff's rights in the service marks National with design and National have unlawfully and wilfully infringed said service marks and registrations therefor, and have unfairly competed with plaintiff by offering for sale and selling services for the transportation of goods by motor van under the service marks National with design and National; and the acts of defendant are calculated to deceive and do in fact deceive the purchasing public into the belief that defendant's services are plaintiff's services; and said defendant threatens to continue to infringe said service marks and to compete unfairly, to plaintiff's irreparable injury and loss unless restrained by this court.

Wherefore, Plaintiff demands:

1. That defendant, his agents, servants, employees, privies, successors and assigns, and all holding by, through, or under him, be temporarily and permanently enjoined and restrained:

(a) From further violation of the agreement entered into on November 7, 1944, between plaintiff and defendant;

(b) From conducting business under the trade

name National Transfer & Storage Co. and from using in the sale or rendering of services relating to the moving of household goods by motor van the name National Transfer & Storage Co. or from using such name for any related services, or from using any name including the name National or any colorable imitation of plaintiff's registered Service Marks National and design and National;

(c) From otherwise infringing plaintiff's said service marks and registrations therefor;

(d) From unfairly competing with plaintiff in the sale or rendering of services relating to the transportation of household goods by motor van.

2. An accounting against defendant from all profits realized from the sale of services for the transportation of household goods by motor van and the like under the name National or National and design, or any colorable imitation of plaintiff's service marks National or National and design, and for all damages sustained by plaintiff on account of the infringement and unfair competition aforesaid, and that said damages be trebled.

3. That defendant be required to deliver up and to destroy all devices, letterheads, advertising material, etc. bearing the service marks National and National and design, and to strike out and obliterate the design display of said service marks on any and all trucks owned, operated, or in any way controlled by him.

4. That plaintiff have and recover its costs of this suit including reasonable attorneys fees.

5. That plaintiff have such other and further relief as this Court may deem just.

NATIONAL VAN LINES, INC.

/s/ By FRANK L. McKEE,

President [7]

/s/ ALBERT J. FIHE,

Attorney for Plaintiff

Duly Verified. [8]

PLAINTIFF'S EXHIBIT No. 1

Registered Sept. 11, 1951 Registration No. 548,018

Principal Register Service Mark

United States Patent Office

National Van Lines, Inc., Chicago, Ill. Act of 1946.

Application May 17, 1948, Serial No. 557,202.

[Service mark of National Van Lines, Inc.]

Statement

National Van Lines, Inc., a corporation duly organized under the laws of the State of Illinois, located at Chicago and doing business at 2431 Irving Park Road, has adopted and is using the service mark shown in the accompanying drawing, for Transportation of Goods by Motor Van, in Class 105, Transportation and storage, and presents herewith five specimens showing the service mark as actually used in connection with the sale or advertising of such services; the service mark being used as follows: on the sides of the trucks used in moving

goods; on advertising literature; on business cards; and on letter heads and envelopes, and requests that the same be registered in the United States Patent Office on the Principal Register in accordance with the act of July 5, 1946. No claim is made to the words "Nation Wide" and "Van Lines Inc." apart from the mark as shown.

The service mark was first used on July 21, 1934, and first used in the sale or advertising of services and the services rendered in commerce among the several States which may lawfully be regulated by Congress on July 21, 1934.

National Van Lines, Inc.,
By Frank L. McKee, President [9]

PLAINTIFF'S EXHIBIT No. 2

Registered Sept. 9, 1952 Registration No. 563,950
Principal Register Service Mark
United States Patent Office

National Van Lines, Inc., Chicago, Ill. Act of 1946.
Application January 4, 1952, Serial No. 623,200
[Service mark of National Van Lines, Inc.]

Statement

National Van Lines, Inc., a corporation duly organized under the laws of the State of Illinois, located at Chicago and doing business at 2431 Irving Park Road, has adopted and is using the service mark shown in the accompanying drawing, for the

Transportation of Goods by Motor Van, in Class 105, Transportation and storage, and presents herewith five specimens showing the service mark as actually used in connection with the sale or advertising of such services; the service mark being used as follows: on the sides of the trucks used in moving goods; on advertising literature; on business cards; and on letter heads and envelopes, and requests that the same be registered in the United States Patent Office on the Principal Register in accordance with section 2(f) of the act of July 5, 1946.

Applicant disclaims exclusive use of the words "Van Lines, Inc." apart from the mark as shown.

National Van Lines, Inc., is the owner of Registered Service Mark 548,018, registered September 11, 1951, on the Principal Register of the United States Patent Office.

The service mark was first used by applicant's predecessor in title on or about October 1928, and first used by applicant on June 21, 1934, and first used in the sale or advertising of services and the services rendered in commerce among the several States which may lawfully be regulated by Congress by applicant's predecessor in title on or about October 1928, and by applicant on June 21, 1934.

The mark is claimed to have become distinctive of the applicant's services in commerce which may lawfully be regulated by Congress through substantially exclusive and continuous use thereof as a mark by the applicant in commerce among the several States which may lawfully be regulated by

Congress for the five years next preceding the date of the filing of this application.

National Van Lines, Inc.,
By Frank L. McKee, President [10]

PLAINTIFF'S EXHIBIT No. 3
[Handwritten: "Canceled 2-20-50"]
Sales Agent Agreement

This agreement made and entered into by and between National Van Lines, Inc., an Illinois Corporation, hereinafter referred to as the "Company", party of the first part, and National Van & Storage Co., an Individual, located at 1431 Pacific Highway, San Diego, California.

Witnesseth:

Whereas, the Company is a motor carrier engaged in the transportation of goods, wares and merchandise for hire on the public highways throughout the United States and Canada under the trade name of "National Van Lines", and maintains offices in various cities and towns in connection with its business; and

Whereas, the Sales Agent is now engaged in business and maintains an office in connection with such business; and

Whereas, The Sales Agent desires to associate himself with the Company as a sales representative in arranging for the transportation of goods, wares and merchandise in the name of National Van Lines, Inc., pursuant to their governmental certifi-

Plaintiff's Exhibit No. 3—(Continued)

cates, permits and franchises, and the operations that are authorized thereunder, on a commission basis.

Now therefore, in consideration of the mutual promises and covenants hereinafter set forth, the parties hereto agree as follows: * * * * * [11]

Sales Rights

The Company hereby grants to the Sales Agent the right and privilege of soliciting the transportation of goods, wares and merchandise and/or executing Orders for Services therefore, in the name of the Company, in accordance with current Company tariffs, in the territory hereby designated: for service in all States of the Union and Washington, D.C., excepting: Idaho, Montana, Nevada, North Dakota, Oregon, Utah, Vermont, Washington, Wyoming. The Sales Agent agrees to diligently exercise the sales rights granted herein, for the Company, to the exclusion of its competitors, except that the Sales Agent may solicit for the transportation of goods, wares and merchandise insofar as he is legally authorized and engaged. All orders are subject to acceptance by company.

Use of Company Name

The Sales Agent agrees that he will not use the names "National Van", "National Van Lines", "National Van Lines, Inc.", or any combination thereof, or the Company insignia, and/or Company adver-

Plaintiff's Exhibit No. 3—(Continued)

tising for purposes other than transactions resulting from the Sales Rights granted herein, or otherwise specifically authorized by the Company, and agrees that he will not misrepresent the Company and/or its service in any manner. * * * * * [12]

Obligation for Service

The Sales Agent agrees that the Company's obligation to accept goods, wares and merchandise for transportation is subject to capacity, type of vehicles, facilities, equipment and personnel available, and that the Company is not obligated to transport goods, wares and merchandise by any particular vehicle, train or vessel, or otherwise than with reasonable dispatch.

Advertising

(a) Telephone Directory: The Sales Agent agrees at the earliest opportunity prior to the deadline for accepting advertising in the first issue of his local telephone directory published subsequent to the date of this agreement, to submit to the Company, copy for an advertisement to appear therein. The Sales Agent further agrees that he will contract in his own name and at his own expense for the insertion in such directory and/or subsequent issues thereof, of the copy approved by the Company, as well as the alphabetical listing of the name "National Van Lines, Inc." opposite his telephone number, such advertising to be continued during the term of this agreement.

Plaintiff's Exhibit No. 3—(Continued)

(b) Other: The Company agrees (at its expense) to provide the Sales Agent with available sales literature and/or signs of such type and quantity as it deems of value in promoting the mutual interest of itself and the Sales Agent.

Procedure

The Sales Agent agrees to forward promptly to the Chicago office of the company, located at 2431 Irving Park Road, or such other office as may be subsequently designated by the Company, signed Orders for Services, estimate sheets, purchase orders, and other supporting papers, and/or other essential papers pertaining to [13] any Company transaction, together with any deposits, collections, or other Company funds coming into his possession. The Sales Agent agrees that he will conform with the current practices of the Company relating to the procedure in handling all Company transactions.

Supplies

The Company agrees to furnish (at its expense) the Sales Agent with stationery, forms, tariffs, and supplements essential to the performance of his activities pursuant to this agreement. The Sales Agent agrees that he will provide himself promptly (at his expense) with the necessary Mileage Guides currently in use.

Earnings and Their Payment

The Sales Agent shall be credited with and en-

Plaintiff's Exhibit No. 3—(Continued)

titled to receive from the Company in full payment for all services furnished by himself and/or employees and/or facilities, an amount determined in accordance with the company's "Schedule Of Commissions", current copy of which is attached to and forms a part of this Agreement. Variations, revisions or changes in such "Schedule Of Commissions" caused by changes in Company tariffs become effective at the same time as the tariff changes take place. Any variation, revision or change in the "Schedule of Commissions", either as provided herein or by subsequent agreement between the parties hereto shall not alter the other terms and conditions of this Agreement. In the event of necessary variation, revision, or change in the "Schedule Of Commissions", the Company will furnish the Sales Agent, as soon as possible, with a varied, revised, or changed "Schedule Of Commissions", indicating therein the [14] date upon which it takes effect. Such Sales Agent's earnings become due and payable when the Company has evidence that the shipments upon which earnings are computed are en-route, either from original location direct to final destination, or, where storage is involved at or near point of origin, from warehouse to destination.

Precedence

This Agreement shall supersede, replace, and take precedence over any prior agreement of a similar character between the parties hereto.

Plaintiff's Exhibit No. 3—(Continued)

Termination

This agreement may be terminated at any time upon the written request of the Sales Agent, or the written notice of termination by the Company sent registered mail to the last known address of the Sales Agent, provided, however, that upon such termination the Sales Agent shall immediately:

(a) Return to the General Office of the Company, at his expense, all unused sales literature, and/or signs, and/or selling aids, and/or Company stationery, and/or forms, and/or data pertaining to Company procedure and records.

(b) Discontinue the use of the names "National Van", "National Van Lines", or "National Van Lines, Inc.", in any manner whatsoever. [15]

Term

This agreement shall remain in full force and effect for the period commencing the 7th day of November, 1944 and ending December 31, 1945 and from year to year thereafter, unless terminated by either party as herein provided.

In witness whereof the parties hereto have caused these presents to be executed on this 7th day of November, 1944.

National Van Lines, Inc.

/s/ By F. L. McKee, President

Attest:, Assistant Secretary.

Plaintiff's Exhibit No. 3—(Continued)

For Corporate Sales Agent

.....

By.....

Attest:, Secretary.

For Individual or Partnership Sales Agent

National Van & Storage Co.,

/s/ By A. E. Dean, Owner

Witness: [16]

Commission Paid to Agent

Earnings shall be paid on a commission basis as shown below:

15% of through line revenue on business signed by the agent and hauled by National Van Lines' equipment from point of origin to point of destination. (Eastbound)

20% of through line revenue on business signed by the agent picked up and held at their warehouse for subsequent service by National Van Lines' equipment. (Eastbound)

10% on all orders signed by the agent and hauled by National Van Lines.

The above commissions are applicable to van shipments only. [17]

Rules Governing Application of Above Rates

Rule 1. Commissions Paid Only on Hauled Business: The applicable rates of commissions shown in columns "A" and "C" of Item 1 are payable only

Plaintiff's Exhibit No. 3—(Continued)

on such business as is actually hauled by the Company; except that, when the Sales Agent, under the authority of a specific and individual arrangement with the Company for any shipment, transports such shipment, the applicable rates of commission for Transportation Service Charges and Divided shipments only, as shown in columns "A" and "C" are payable in addition to the applicable variable and other rates of commission shown in columns "B" and "D".

Rule 2. Personal Business: Personal Business is that business signed by either the Sales Agent personally, or an employee or duly authorized representative of the Sales Agent.

Rule 3. Transportation Service Charges: Transportation service charges are those charges made specifically for transportation and are exclusive of any and all other charges.

Rule 4. Additional Service Charges: Additional Service Charges are those charges made in accordance with current tariffs. When these services are performed by the Company, most of them are rendered at actual cost. For this reason, commissions will be paid only on those charges for which a rate of commission is shown in Item 1 above. [18]

Rule 5. Commission Paid on Western Shipments: The applicable rates of commission shown in column E of Item 1 are payable only on such business as is actually hauled by the Company. Likewise for commission shown in column F of Item 1. The Sales Agent is to receive the rates of commission

Plaintiff's Exhibit No. 3—(Continued)

shown in column B if such service indicated thereby are performed by the Sales Agent.

Rule 6. Charges Prepaid or Advanced for Account of Shipper: Under this classification fall such items as the payment by the Company of storage and warehouse charges at time of loading, or delivery from warehouse at final destination as well as charges for local haul, such charges ultimately being assumed by the shipper. These items are exemplary only, and do not limit the generality of this classification. The ruling of the Company as to whether or not any specific item is a charge of this nature shall be conclusive.

Rule 7. Bid Price: This term is used solely in connection with Government shipments. For the purpose of computing the Sales Agent's earning, it shall include only the cost of Transportation Service.

Rule 8. Adjusted Transportation Service Charges: If for any reason the Company deems it advisable and does have any shipment picked up and temporarily stored for purposes of consolidation and forwarding, the amount of the Transportation Service Charges for the shipment will be reduced by the cost of such services before computing the Sales Agent's sales commission thereon.

Rule 9. Split Commissions: A split commission is a commission divided between two or more Managers and/or Salesmen and/or Sales Agents. The Sales Agent will be governed by any current bulletins on split commissions. [19]

[Title of District Court and Cause.]

MOTION TO DISMISS, OR IN THE ALTERNATIVE MOTION FOR MORE DEFINITE STATEMENT

Comes now the defendant Alfred E. Dean doing business under the firm name and style of National Transfer & Storage Co., by C. P. Von Herzen and S. L. Laidig and Howard B. Turrentine, Esqs., his attorneys, and move the court as follows:

I.

To dismiss the action because the complaint fails to state a claim against this movant upon which relief can be granted. Said motion is based on the pleadings and documents filed herein by the plaintiff, and the movant in support thereof assigns the following reasons:

1. While the plaintiff's complaint is couched in general terms and the word "National" is taken out of its context both with respect to the copyright used by the plaintiff and the method of its use by the defendant, the contract which is appended to plaintiff's complaint and marked Exhibit No. 3 specifically provides that on termination the defendant will discontinue [22] the use of the names "National Van", "National Van Lines" or "National Van Lines, Inc." it affirmatively appears that the use of the name National Transfer & Storage Co. has been by agreement permitted to this movant.

2. The contract which is attached to plaintiff's complaint, and which is denominated plaintiff's Ex-

hibit 3 appears to have written across the face of the contract the words and figures "Canceled 2-20-50" and there appears to be no signature upon said words nor does it appear how or in what manner it was canceled, but on the face of the contract it appears that there is no contract whatever, and therefore the plaintiff's attempt to base his complaint upon the contract is an attempt to breathe life into a canceled document.

II.

In the alternative, this moving defendant respectfully shows that the plaintiff's complaint is so vague and ambiguous that this defendant should not reasonably be required to prepare a responsive pleading to its present form, and defendant therefore moves that the plaintiff be ordered to furnish a more definite statement of the nature of its claim as set forth in its complaint in the following respects:

1. That the plaintiff be required to allege the circumstances and manner under which the words and figures "Canceled 2-20-50" were placed and written upon the face of the alleged contract attached to plaintiff's complaint and marked Exhibit No. 3, and that either said words and figures be satisfactorily explained, or that the plaintiff be required to place his complaint on trial without reference to said contract.

2. That the plaintiff be required to set forth specifically a copy of the defendant's design and name

which the plaintiff alleges to be infringing upon plaintiff's copyright. In that connection this defendant asserts that if the plaintiff is so required to set forth the alleged infringing name and service mark that it will be made to appear ipso facto that such alleged infringement does not exist and thereby the time of the court, counsel and all parties will be conserved. [23]

3. That the plaintiff be required to set forth in paragraph 11 the date and places where it allegedly "repeatedly advised" the defendant of the violation of the plaintiff's rights, etc. This appears to be extremely important in view of the passage of time between the alleged termination of the contract and the date of the filing of the pleading herein.

4. That the plaintiff be required to set forth how or in what manner the contract, which is attached to plaintiff's complaint and marked Exhibit 3, may be enlarged to embrace the alleged "close imitation" of plaintiff's service mark and the service mark "National".

Dated: March 24, 1953.

HOWARD B. TURRENTINE,
C. P. VON HERZEN &
S. L. LAIDIG,

/s/ By C. P. VON HERZEN,

Attorneys for defendant [24]

Affidavit of Service by Mail attached. [26]

[Endorsed]: Filed March 25, 1953.

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

In compliance with the Court's ruling requiring plaintiff to amend its complaint plaintiff hereby amends as follows:

In paragraph 10 of plaintiff's Complaint add the following matter at the end thereof:

—The agreement provided for a continuing abstaining by defendant of the use of National Van, National Van Lines, or National Van Lines, Inc. in any manner whatsoever in the event of termination.

That the agreement was terminated according to the provisions thereof by the defendant sending a registered letter of cancellation to plaintiff on February 20, 1950 to confirm a teletype message of cancellation sent February [27] 14, 1950.—

In paragraph 11 of plaintiff's Complaint add the following after the first sentence thereof:

—An example of the defendant's mark comprising National and design, which is the subject matter of this complaint, is attached hereto as plaintiff's Exhibit No. 4.—

At the end of the second sentence in paragraph 11 add the following:

—Such repeated notices were made in a registered letter to National Transfer & Storage Co. dated November 9, 1951 from Kenneth T. Snow, a letter to Mr. Howard B. Turrentine, attorney for

defendant, dated June 5, 1952 from Wilkinson, Huxley, Byron & Hume by Gerrit Groen, and a letter to Mr. Howard Turrentine dated June 13, 1952 from Wilkinson, Huxley, Byron & Hume by Gerrit Groen. The originals of these letters are in the possession of defendant or its counsel.—

Respectfully,

/s/ KENNETH T. SNOW

/s/ GERRIT P. GROEN

WILKINSON, HUXLEY,
BYRON & HUME,

ALBERT J. FIHE,

/s/ By ALBERT J. FIHE,

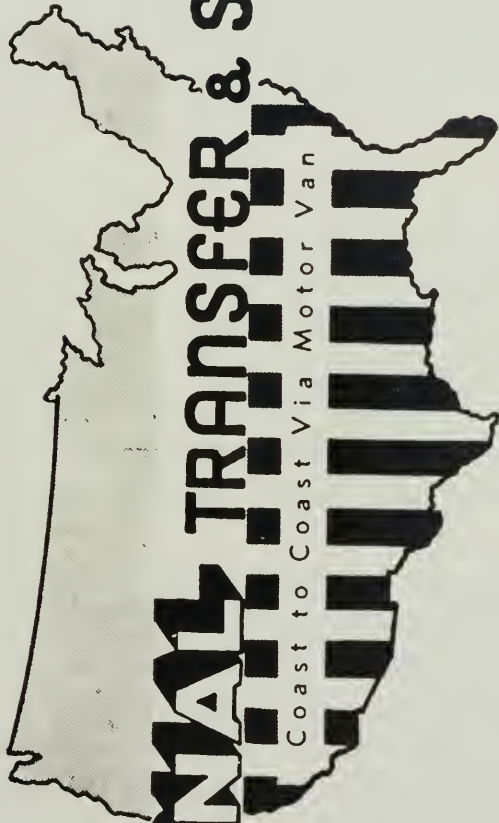
Of Counsel for Plaintiff

[28]

[Endorsed]: Filed April 23, 1953.



NATIONAL TRANSFER & STORAGE



PLAINTIFF'S EXHIBIT No. 4



[Title of District Court and Cause.]

MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT

Comes now the defendant Albert E. Dean doing business under the firm name and style of National Transfer & Storage Co., by Howard B. Turrentine and C. P. Von Herzen & S. L. Laidig, his attorneys, and moves the court as follows:

I.

To dismiss the action because the Complaint and the Amendment to Complaint failed to state a claim against this movant upon which relief can be granted. Said motion is based on the pleadings and documents filed herein by the plaintiff, the complaint and the amendment to complaint filed herein, and the movant in support thereof, assigns the following reasons:

1. (a) It affirmatively appears that the only portion of the plaintiff's alleged service mark that has been granted registry by the United States Patent office is the word "national". (See paragraph 8 of plaintiff's original complaint.) [32]

(b) The plaintiff has failed to state that the mark with respect to the geographical use of the name "national" has become distinctive in the requirement that the use of this word has been exclusive and continuous for a period of five years next preceding the date of the filing of the application for registration. (See Section 2(f), U.S.C.A. 1052).

2. It is clearly implied in the complaint and attached papers that the use of the word "national", as distinguished from the balance of the plaintiff's alleged service mark, has been permitted to this movant by agreement of both the plaintiff and the defendant. (See contract, Exhibit 3 attached to original complaint, page 5, Section (b)).

II.

In the alternative, this moving defendant respectively shows that the plaintiff's complaint and the "Amendment to Complaint" are so vague and ambiguous that this defendant should not reasonably be required to prepare a responsive pleading to their present form, and the defendant therefore moves that the plaintiff be required to furnish a more definite statement as to the nature of its claim as set forth in the complaint and the Amendment to Complaint in the following respects:

1. That the plaintiff be required to allege the facts, circumstances, times and places and the manner under which the use of the words "National Transfer & Storage Co." which appear to be specifically excluded from the contract attached to plaintiff's complaint, as Exhibit No. 3 (page 2, last paragraph) and how the plaintiff proposes to embrace said words in the contract in accordance with the allegations contained in its "Amendment to Complaint" in that connection it would appear that unless plaintiff is able to make such a pleading the time and effort incident to a trial are entirely unnecessary).

2. That the plaintiff be required to limit its complaint to that portion of its alleged service mark consisting of the design, as the use of the geographic work "national" cannot be made the subject of a service mark in view of the lack of exclusiveness of use.

3. The plaintiff having failed to comply with the court's order [33] with respect to paragraph (4) of this moving defendant's previous motion to make more specific and certain, and having failed to make any allegation in connection therewith, this movant reiterates said paragraph as follows:

"(4) That the plaintiff be required to set forth how or in what manner the contract, which is attached to plaintiff's complaint and marked Exhibit 3, may be enlarged to embrace the alleged 'close imitation' of plaintiff's service mark and the service mark 'National'."

Dated: May 11, 1953.

HOWARD B. TURRENTINE,
C. P. VON HERZEN &
S. L. LAIDIG,

/s/ By C. P. VON HERZEN,

Attorneys for defendant [34]

Affidavit of Service by Mail attached. [36]

[Endorsed]: Filed May 11, 1953.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Dec. 31, 1953, at Los Angeles, Calif.

Present: The Hon. Ernest A. Tolin, District Judge; Deputy Clerk: Wm. A. White; Reporter: none; Counsel for Plaintiff: no appearance; Counsel for Defendant: no appearance.

Proceedings: It is ordered that defendant's motion to dismiss the complaint and amendment to complaint, or in the alternative, for more definite statement, heretofore taken under submission, be, and hereby is denied.

Clerk will notify counsel.

EDMUND L. SMITH,

Clerk

[37]

[Title of District Court and Cause.]

ANSWER

Comes now Alfred E. Dean, and answering plaintiff's complaint on file herein, admits, denies and alleges as follows:

1. Answering paragraph 2 of plaintiff's complaint, this answering defendant denies each and every allegation therein contained, except that prior to the summer of 1953 he did do business under the name and style of National Transfer and Storage Company, and in that connection further alleges

that since the summer of 1953 he has been doing business under the name and style of Dean Van Lines.

2. Answering paragraph 3 of plaintiff's complaint, this answering defendant admits the allegations therein contained, except that the parties are citizens of different states, and except that the amount involved exceeds the sum of \$3,000.00, and in that respect denies the allegations of said complaint.

3. Answering paragraph 4 of plaintiff's complaint, this answering defendant generally and specifically denies each and every allegation [38] therein contained.

4. Answering paragraph 5 of plaintiff's complaint, this answering defendant generally and specifically denies each and every allegation therein contained.

5. Answering paragraph 6 of plaintiff's complaint, this answering defendant generally and specifically denies each and every allegation therein contained.

6. Answering paragraph 7 of plaintiff's complaint, this answering defendant generally and specifically denies each and every allegation therein contained.

7. Answering paragraph 8 of plaintiff's complaint, this answering defendant generally and specifically denies each and every allegation therein contained.

8. Answering paragraph 9 of plaintiff's complaint, this answering defendant admits the execution of the agreement dated November 7, 1944; as to the remainder of the allegations contained in said paragraph, this answering defendant generally and specifically denies each and every allegation therein contained.

9. Answering paragraph 10 of plaintiff's complaint, this answering defendant admits the termination of the agreement in the year 1950, as to the remainder of the allegations contained in said paragraph this answering defendant generally and specifically denies each and every allegation therein contained.

10. Answering paragraph 11 of plaintiff's complaint, this answering defendant generally and specifically denies each and every allegation therein contained.

11. Answering paragraph 12 of plaintiff's complaint, this answering defendant generally and specifically denies each and every allegation therein contained.

12. Answering paragraph 13 of plaintiff's complaint, this answering defendant generally and specifically denies each and every allegation therein contained. [39]

Wherefore, defendant prays that plaintiff take nothing by its action on file herein, and that he may have and recover the costs of this suit including a

reasonable attorneys' fees and for all other proper relief.

HOWARD B. TURRENTINE,
C. P. VON HERZEN &
S. L. LAIDIG,

/s/ By C. P. VON HERZEN,

Attorneys for defendant [40]

Duly Verified.

Affidavit of Service by Mail attached. [41]

[Endorsed]: Filed Feb. 3, 1954.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: March 1, 1954, at Los Angeles, Calif.

Present: The Hon. Ernest A. Tolin, District Judge; Deputy Clerk: Wm. A. White; Reporter: Virginia Wright; Counsel for Plaintiff: Ernest Shelander; Counsel for Defendant: C. P. Von Herzen.

Proceedings: For setting.

It is ordered that cause is set for pretrial June 15, 1954, 2 p.m., and for trial Oct. 26, 1954, 10 a.m.

EDMUND L. SMITH,
Clerk [42]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: June 15, 1954, at Los Angeles, Calif.

Present: Hon. Ernest A. Tolin, District Judge;
Deputy Clerk: Wm. A. White; Reporter: Virginia
Wright; Counsel for Plaintiff: Albert J. Fihe;
Counsel for Defendant: C. P. Von Herzen.

Proceedings: For pretrial. (In Chambers).

Plf's Ex. 1 and 2 are received into evidence.

Plf's Ex. 3, 4, 5, 6, 7-A, 7-B, and 9 are received
into evidence.

Plf's. Ex. 8 and 10 are marked for ident. only.

Plf's Ex. 11, 12, 13, and 14, are marked for ident.
only.

Plf's Ex. 15 is received into evidence.

Plf's Ex. 16 and 17 are marked for ident.

Deft's Ex. A and B are received into evidence.

EDMUND L. SMITH,

Clerk

[43]

June 21, 1955

Mr. Albert J. Fihe, 1023 Victory Place, Burbank, California.

Mr. Gerrit P. Groen, 38 So. Dearborn Street, Chicago, Illinois.

Mr. Collins Mason, 811 West 7th Street, Los Angeles, California.

Mr. C. P. Von Herzen, 453 So. Spring Street, Los Angeles, California.

Re: National Van Lines, Inc., vs. Alfred E. Dean, etc., Case No. 14,783-T Civil

Gentlemen:

Please be advised a minute order has been entered in the above-entitled matter, this date, upon the direction of Judge Tolin, that the court finds in favor of the defendant and orders judgment accordingly, counsel for the defendant to prepare findings of fact and conclusions of law and judgment under Local Rule 7, and to have judgment for costs.

Very truly yours,

JOHN A. CHILDRESS,
Clerk

By WM. A. WHITE,
Deputy Clerk

[44]

[Title of District Court and Cause.]

FIRST AMENDED ANSWER

Comes now the defendant, above named, and for first amended answer to plaintiff's complaint on file herein, admits, denies and alleges as follows:

1. Answering paragraph 2, this defendant denies the allegations therein contained save and except that he admits that from a time in or about the month of November, 1944, to in or about the middle of 1953 he did business under the name and style of National Transfer and Storage Company.

2. Answering paragraph 3, this defendant admits the same save and except that it denies that the amount involved, [45] exclusive of interest and costs, exceeds the sum of Three Thousand (\$3,000.00) Dollars.

3. Answering paragraphs 4, 5, 6 and 7, this defendant is without knowledge, information or belief as to the allegations therein contained sufficient to enable him to answer the same and, therefore, denies generally and specifically each and every allegation therein contained.

4. Answering paragraph 8, this defendant denies generally and specifically each and all of the allegations therein contained save and except that defendant admits that on September 11, 1951, plaintiff caused to be registered in the United States Patent Office, as an alleged service mark, the composite name "National Van Lines, Inc.", together with an alleged shield depicting the national colors

of the United States; and that on September 9, 1952, plaintiff caused to be registered in the United States Patent Office, as an alleged trade-mark, the composite name "National Van Lines, Inc."

5. Answering paragraph 9 of plaintiff's complaint, this answering defendant admits the execution of the agreement dated November 7, 1944; as to the remainder of the allegations contained in said paragraph, this answering defendant generally and specifically denies each and every allegation therein contained.

6. Answering paragraph 10, this defendant admits the same.

7. Answering paragraph 11, this defendant denies generally and specifically each and every allegation therein [46] contained.

8. Answering paragraph 12, this defendant denies generally and specifically each and all the allegations therein contained save and except that he admits that from in or about November, 1944, to about the middle of 1953 defendant engaged in business of shipping household and other goods by motor van under the name National Transfer and Storage Co., in conjunction with which name defendant has since, in or about the year 1951, displayed a representation of a map of the United States bearing color marks denoting the national colors of the United States. Further answering said paragraph, defendant alleges that in or about the middle of 1953, defendant changed the name of his said business to "Dean Transfer and Storage Co."

9. Answering paragraph 13, this defendant de-

nies generally and specifically each and every allegation therein contained.

10. Further answering said complaint, defendant denies that he has infringed or is infringing or threatens to infringe upon any trade-mark or service mark owned by plaintiff.

11. Further answering said complaint, defendant denies that he has committed, is committing, or threatens to commit any act of unfair competition.

12. Further answering said complaint, defendant denies that he has violated or is violating said agreement of November 7, 1944, or any agreement with plaintiff. [47]

13. Further answering said complaint, and as a first separate defense thereto, defendant alleges that plaintiff's said pretended trade-marks and the said claimed registrations thereof, are invalid and void for each of the following reasons:

(a) That the word "National" is merely descriptive and is incapable of exclusive appropriation as a trade-mark;

(b) That the colors red and white arranged as alternate parallel stripes in conjunction with a field colored blue, constitute the national colors of the United States as well as an essential part of the flag and seal of the United States, and are incapable of exclusive appropriation as a trade-mark;

(c) That the word "National" has for such a long time been in such wide and varied use by so many different concerns in the United States as a part of firm and corporate names and as a pretended trade-mark and as a part of trade-marks,

that the public has long since ceased to associate said word with any particular concern, or with the goods or services of any particular concern;

(d) That shields and escutcheons wherein alternate red and white parallel stripes are arranged perpendicular to a blue field, have been in such wide and varied use by so many different concerns in the United States as embellishments for trade-marks, trade-names and advertisements and parts thereof that the public has long since ceased to associate such shields or escutcheons with any particular concern or with the goods or services of any particular concern;

14. Further answering said complaint, and as a second separate defense thereto, defendant alleges that plaintiff misled and induced the Commissioner of Patents of the United States to grant to it said trade-mark registrations Nos. 548,018 and [48] 563,950, by falsely representing to said Commissioner of Patents that plaintiff had enjoyed exclusive use of said term "National" and said shield forming a part of said registration No. 548,018, as trade-marks, when, in fact, said term "National" as well as said shield have for many years been commonly used by various concerns in the United States; and that therefore plaintiff is estopped to assert ownership of said pretended trade-marks in a Court of Equity.

15. Further answering said complaint, and as a third separate defense thereto, defendant alleges that plaintiff is estopped to be heard to assert or claim that defendant's use of the name "National

Transfer & Storage Company” constitutes any violation of any right of, or unfair competition against, plaintiff, for the reason that defendant adopted and used said name with the full knowledge, acquiescence and consent of plaintiff, and that plaintiff failed to object to defendant’s use of said name until after defendant had extensively used said name as the name of defendant’s business for a period of approximately eight years and until defendant had built up and acquired a valuable good will associated with said name.

Wherefore, defendant prays that plaintiff’s complaint be dismissed, that defendant recover his costs and disbursements herein and that defendant have such further relief as the Court may deem just and equitable.

ALFRED E. DEAN,
trading under the firm name and
style of National Transfer &
Storage Co., Defendant

By HOWARD B. TURRENTINE,
C. P. VON HERZEN, S. L. LAIDIG,
and MASON & GRAHAM

/s/ By COLLINS MASON,
Attorneys for Defendant [49]

Affidavit of Service by Mail attached. [50]

[Endorsed]: Lodged Oct. 4, 1954. Filed Oct. 11, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having come on for trial before the Court commencing December 16, 1954, the Court, having heard and considered the evidence and briefs presented by the respective parties, and being fully advised in the premises, makes the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff, National Van Lines, Inc., is an Illinois corporation having its principal place of business in Chicago, Illinois. [51]

2. Defendant, Alfred E. Dean, doing business as National Transfer & Storage Co., resides and has his principal place of business in San Diego, California. Approximately six months before the trial of this action, (and approximately one and one-half years after this suit was filed) defendant changed his assumed business name from "National Transfer & Storage Co." to "Dean Van Lines" and is no longer using the name "National Transfer & Storage Co."

3. Plaintiff, National Van Lines, Inc., operates a motor van line engaged in the transportation of household goods in interstate commerce. Much of plaintiff's business is booked by various other transfer companies, while acting as booking agents for

plaintiff, also carry on their own independent transfer businesses under their own names.

4. Plaintiff began interstate business in 1928 as "National Shippers & Movers" and in 1934 incorporated as "National Van Lines, Inc."

5. Plaintiff displays upon its moving vans and other material a vertical stripe design in conjunction with the name "National".

6. Plaintiff has secured registrations on the Principal Register, in the United States Patent Office as follows:

No. 548,018, dated September 11, 1951 for [52] the composite mark "National" and a vertical stripe design;

No. 563,950, dated September 9, 1952, for "National".

7. Plaintiff's use of the word "National" is primarily as a part of the composite name "National Van Lines, Inc."

8. The word "National" alone or in conjunction with "Van Lines, Inc." is recognized by the public to exclusively identify plaintiff or plaintiff's services of moving household goods by motor van.

9. The vertical stripes do not cause the public to particularly identify plaintiff or plaintiff's services of moving household goods by motor van.

10. Defendant began the transfer and storage business in 1936 in California and operated under various names such as "Golden State Van & Storage" and "Coast Van Lines". On October 28, 1944

defendant adopted the trade name "National Van & Storage" pending negotiations with plaintiff for an agency license, and ten days later entered into an agency license agreement with plaintiff. Shortly thereafter defendant adopted the name "National Transfer & Storage Co." Defendant's initial operations were largely concentrated in California but subsequently were expanded to coast-to-coast interstate use.

11. On November 7, 1944 plaintiff entered into a written contract (Exhibit 5) with the defendant, which contract remained in full force and effect until February 20, 1950. By virtue of [53] such contract, plaintiff engaged defendant as a booking agent upon a commission basis to book interstate shipments for plaintiff in plaintiff's name, to be handled by plaintiff's moving vans, while at the same time defendant was carrying on his own transfer business. Such contract was executed by defendant under the name "National Van & Storage Co." and contained provisions to the effect that defendant would not use "National Van", "National Van Lines", "National Van Lines, Inc.", "or any combination thereof", "or the Company insignia * * *". In 1949 just before the cancellation of the agreement, defendant added a vertical stripe design to his "National" name because "It had a lot of trademark value". On November 9, 1951 plaintiff complained to defendant of defendant's use of the "National" name and the vertical stripe design.

12. The design used by defendant, consisting of an outline map of the United States, displaying

vertical stripes, is distinctly different from plaintiff's design comprising vertical stripes in a shield design.

13. The record contains evidence of confusion but it is not of such character as to warrant an injunction.

14. Defendant's adoption and use of a vertical stripe design is not an infringement against plaintiff.

15. Defendant has not committed any acts or unfair competition against plaintiff.

16. Defendant's use of "National" after termination of the [54] agreement is a violation of the termination provisions of the contract.

Conclusions of Law

1. This action arises under the trade mark laws of the United States and is for unfair competition.

2. This court has jurisdiction of the parties.

3. Plaintiff's registration No. 563,950 is valid and infringed.

4. Plaintiff's Registration No. 548,018 is invalid.

5. Plaintiff is entitled to judgment against defendant's use of "National" as a part of his mark or trade name.

6. Plaintiff cannot claim any exclusive right in the vertical stripe design as part of its mark.

7. Defendant is entitled to judgment with respect to all issues involving the charges of trade mark infringement and unfair competition except with respect to his use of the word "National".

8. Defendant is entitled to judgment for costs.

Los Angeles, California,, 1955.

.,
United States District Judge [55]

[Endorsed]: Lodged Aug. 9, 1955.



[Title of District Court and Cause.]

JUDGMENT

This action having come on for trial before the Court commencing December 16, 1954, the Court, having heard and considered the evidence and briefs presented by the respective parties, having made and entered findings of fact and conclusions of law herein, and being fully advised in the premises,

It is hereby adjudged and decreed as follows:

1. Defendant, and all holding by, through and under him, are permanently enjoined and restricted from using "National" as the dominant part of a mark or trade name.
2. United States registration No. 563,950 is valid and infringed. [56]
3. United States registration No. 548,018 is invalid and void.
4. Plaintiff's complaint herein is dismissed as to all issues except as to the relief sought with respect to the word "National".
5. Defendant shall recover the usual taxable Court costs to be determined.

Dated at Los Angeles, California this day of, 1955.

.....,
United States District Judge [57]

[Endorsed]: Lodged Aug. 9, 1955.

[Title of District Court and Cause.]

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS SUGGESTED ALTERNATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Memorandum is submitted in support of the alternate Findings of Fact and Conclusions of Law submitted by Plaintiff. The findings and conclusions of defendant are deemed to be inaccurate and incomplete in many respects. In submitting the alternate findings, Plaintiff has followed the outline of Defendant's Findings.

For convenience the following comments will be directed to each of Defendant's proposed findings and conclusions in the same order. [58]

Defendant's Finding No. 1: (Plaintiff's Finding No. 1). No change.

Defendant's Finding No. 2: This has been modified by adding additional pertinent facts. (Plaintiff's Finding No. 2).

Defendant's Finding No. 3: This is a conclusion of law rather than a finding and has accordingly been transferred to the conclusions.

Defendant's Finding No. 4: The only change made consists of adding the word "motor" prior to van line in order to accurately state the specific fact. (Plaintiff's Finding No. 3).

Defendant's Finding No. 5: As stated, this finding is entirely erroneous because it omitted the pertinent fact as to Plaintiff's first use of the "National" name in interstate commerce. It has been accurately restated. (Plaintiff's Finding No. 4).

Defendant's Finding No. 6: This finding is entirely inaccurate and even if the facts of record referred to by Defendant were correctly stated, such facts must be objected to as based on testimony which is wholly inadmissible. Plaintiff's objections to this testimony stand.

Defendant's Finding No. 7: This proposed finding is also inaccurate and incomplete. Further, it is objectionable as being argumentative and an attempt to state a conclusion. Nowhere in the record is there a scintilla of evidence which suggests that plaintiff used "National" as part of its name to describe its services. [59]

Defendant's Finding No. 8: As stated by Defendant, it is entirely inaccurate. Again the record is completely devoid of any suggestion that Plaintiff used the official shield of the United States as its trade mark. The facts have accurately been restated. (Plaintiff's Finding No. 5).

Defendant's Findings No. 9 and 10: Plaintiff has accurately restated the facts in its proposed single Finding No. 6. Defendant's proposed Finding No. 9 and 10 are again contrary to the facts of record.

This is evident from a simple inspection of the Registrations in suit, Plaintiff's Exhibits 3 and 4.

Defendant's Finding No. 11: This has been restated as Plaintiff's Finding No. 7. The record abounds with evidence showing that Plaintiff used "National" (not "national") as the dominant part of its service mark and trade name and not as a descriptive term. The record also clearly establishes that Defendant used "National" in the same manner.

Defendant's Finding No. 12: This alleged finding is an argumentative interpretation. It is improper and irrelevant and should be deleted.

Defendant's Finding No. 13: This proposed finding is in part inaccurate and in part contrary to the facts of record. It is also wholly irrelevant and based upon inadmissible testimony. There can be no reasonable dispute about the fact that each party has used "National" strictly as a mark and dominant part of its business name. The Court stated during the trial:

"No one would probably contend here that National Biscuit Company, for instance, or National Lead [60] are infringing upon this Plaintiff, or that this Plaintiff is infringing upon theirs. They all have valid marks, which is the word "National".

The Court then continued:

"Now I will tell you and Mr. Groen what my tentative thought is about it. It seems to me that the Defendant by the use of his "National Transfer & Storage" has prima facie infringed "National Van

Lines" because of the direct competition. And there has been some evidence of confusion already."

For these reasons Defendant's proposed Finding 13 should be eliminated entirely.

Defendant's Finding No. 14: This finding also is based on inadmissible evidence strenuously objected to by Plaintiff at the trial. Even if the evidence were admissible, it establishes that designs, even though they incorporate features similar to flags or known shields, have excellent trade mark significance.

Defendant's Finding No. 15: Plaintiff substitutes Finding No. 8 for this finding. Again, as Defendant has attempted to state the facts, they are inaccurate, argumentative and based upon Defendant's suppositions. To complete the findings on this subject, Plaintiff also added proposed Finding No. 9.

Defendant's Finding No. 16: Plaintiff has restated this as its Finding No. 10. Defendant's finding is incomplete in that it omits important dates and names.

Defendant's Finding No. 17: Defendant's finding is again inaccurate and incomplete and also contains argumentative and irrelevant statements. Plaintiff has therefore restated it as its Finding No. 11. As [61] restated by Plaintiff, the finding is concise, strictly factual and complete. To illustrate the argumentative nature of Defendant's finding, attention is invited to the statement wherein Defendant attempts to interpret Mr. Dean's state of mind at the time he signed the contract. Obviously this is improper.

Defendant's Finding No. 18: This finding has been restated to correctly reflect the facts and avoid the argumentative statements of Defendant. It has been restated as Plaintiff's Finding No. 12.

Defendant's Finding No. 19: This proposed finding is entirely contrary to the record, repeatedly Plaintiff and Defendant acknowledged the fact that each used "National" as a mark and trade name.

Defendant's Finding No. 20: This finding is also contrary to the record. The record contains much evidence of confusion and there are also instances of record as to deliberate confusion by Defendant palming off his services as Plaintiff's. For example see the Stokely incident (San Francisco Deposition, R. W. Adams, Pps. 16-21). In view of the record of confusion, Plaintiff submits Finding No. 13.

Defendant's Finding No. 21: This finding is also entirely contrary to the facts of record and for the sake of accuracy should be deleted. Its substance has been included in Plaintiff's Finding No. 13.

Defendant's Finding No. 22: This finding is in sharp contrast to the facts of record. Plaintiff did not organize the "National Transfer & Storage Company" of Sacramento, California. Organization and ownership of this company by Plaintiff was denied by Mr. McKee when examined by Defendant's counsel. (See record beginning at [62] Pg. 147.)

Defendant's Finding No. 23: This finding must be modified to accurately state the facts of record. Plaintiff in turn submits Finding No. 14.

Defendant's Finding No. 24: No change. Adopted as Plaintiff's Finding No. 15.

Defendant's Finding No. 25: This finding as submitted by Defendant is inaccurate in view of the facts of record and the statement of the Court found on Page 91 of the record. Plaintiff submits Finding No. 16 as a substitute.

Defendant's Conclusions of Law: Defendant has not followed the proper form for Conclusions of Law as required by the Rules of Civil Procedure. To properly dispose of the issues, conclusions must be made with respect to the validity or invalidity of the Plaintiff's registrations in issue. The conclusions of law submitted by Plaintiff are believed to be accurate and in keeping with the record and the pronouncements of this Court at the time of the trial and in the minute order of June 21, 1955.

Conclusion

In submitting its proposed findings and these comments, Plaintiff has made every attempt to be concise and accurate and to fairly present findings in keeping with the undisputed facts of the record. Particular attention is invited to the fact that Plaintiff has here relied upon the Court's statement made during the trial, particularly the statement found beginning at Page 91 of the Record, where the Court stated in part:

"It seems to me that the Defendant by the use of [63] his 'National Transfer & Storage' has prima facie infringed National Van Lines because

of the direct competition. And there has been some evidence of confusion already.”

The results as summarized by Plaintiff's Findings and Conclusions, is in keeping with what the Plaintiff believes to be the Court's intent. Although Defendant may urge that the issue as to the word "National" is moot because Defendant has allegedly discontinued the use of it, Plaintiff takes the position that it is entitled to an adjudication of this issue as it is based on facts in existence at the time the suit was filed and which continued until almost the time of trial.

Respectfully,

/s/ ALBERT J. FIHE

/s/ KENNETH T. SNOW

WILKINSON, HUXLEY,
BYRON & HUME,

/s/ By GERRIT P. GROEN,

Attorneys for Plaintiff

[64]

[Endorsed]: Filed Aug. 9, 1955.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having come on for trial before the Court commencing December 16, 1954, the Court, having heard and considered the evidence and briefs

presented by the respected parties, and being fully advised in the premises, makes the following findings of fact and conclusions of law.

Findings of Fact

1. Plaintiff, National Van Lines, Inc., is an Illinois corporation having its principal place of business in Chicago, Illinois. [69]

2. Defendant, Alfred E. Dean, doing business as National Transfer & Storage Co., resides and has his principal place of business in San Diego, California.

3. This Court has jurisdiction of the parties and of the subject matter of this action.

4. Plaintiff, National Van Lines, Inc., operates a van line engaged in the transportation of household goods in interstate commerce. Much of plaintiff's business is booked by various other transfer companies throughout the country, which transfer companies, while acting as booking agents for plaintiff, also carry on their own independent transfer businesses under their own names.

5. Plaintiff, National Van Lines, Inc., was incorporated and commenced business in Illinois in or about the month of June 1934.

6. When plaintiff adopted said name "National Van Lines" in 1934, said name was in use by another company, "National Van Lines", operating a van line in interstate commerce out of Milwaukee, Wisconsin, which said other company had been so operating since in 1930 and is still so operating.

7. Plaintiff adopted and has used the prefix "national" [70] in its name in the sense of a geographical adjective to denote that its van line is operated upon a national scale, and plaintiff's composite name "National Van Lines, Inc." is merely descriptive, denoting that plaintiff is a corporation operating a nationwide van line service.

8. Plaintiff also displays upon its moving vans and stationery a close simulation of the official shield of the United States.

9. On May 17, 1948 plaintiff filed in the United States Patent Office an application for registration, as a service mark, of the composite name "National Van Lines, Inc." together with said simulation of the official shield of the United States, and after prosecution proceedings in the Patent Office during which, upon the requirements of the Commissioner of Patents, plaintiff filed a disclaimer limiting the mark to the said composite mark as shown in the application, received therefor registration certificate No. 548,018.

10. On January 4, 1952 plaintiff filed in the United States Patent Office an application to register, as a service mark, the word "national", but, upon the requirement of the Commissioner of Patents, plaintiff amended said application to include the composite name "National Van Lines, Inc." and, by disclaimer, limited said mark to said composite term. After said proceedings in the United States Patent Office, plaintiff received registration certificate No. 563,950. [71]

11. Plaintiff has not used the word "national"

except as a part of the composite descriptive name "National Van Lines, Inc."

12. Plaintiff has not used the national colors or stripes of our flag except as a part of the close simulation of the official shield of the United States used by plaintiff.

13. The word "national" is primarily a geographical adjective, immediately suggests itself as the prefix of the name of any business operating upon a nationwide scale, and when so used, as it is used by both plaintiff and defendant, it is neither fanciful nor distinctive, nor capable of appropriation by any one concern to the exclusion of others. In addition to plaintiff's and defendant's use of the word in that sense, the evidence establishes that it is notoriously commonly used by thousands of other business concerns in the same sense. Current telephone directories of only nine cities of the United States show approximately 4,000 listings of such concerns, and the trade mark records of the United States Patent Office contain over 600 registrations of trade marks containing the word "national". Among the various transfer and transportation companies in the United States using said geographical prefix in their business names are:

"National Van Lines" (of Milwaukee, Wisconsin) since during 1930;

"National Transportation Co." (a Connecticut Corporation) since October 1920; [72]

"National Moving and Warehouse Corporation" (a New York corporation) since June 1941;

“National Carloading Corporation” (a New York corporation) since January 1932;

“National Movers, Inc.” (a New Jersey corporation) since March 1948;

“National Cartage Co.” (an Illinois corporation) since November 1946;

“National Freight, Inc.” (a New Jersey corporation) since August 1944;

“National Trucking Co.” (a Florida corporation) since May 1931;

“National Freight Lines, Inc.” (an Illinois corporation) since February 1938.

14. It is, and has been since a time long prior to plaintiff's first use of a simulation of the official shield of the United States, common practice for various concerns in the United States to use simulations of said shield in connection with their trade marks and trade names. Such shield simulations comprise part of some 170 trade mark registrations issued by the United States Patent Office. In the transfer and storage field, such a shield has been continuously used since 1919 and is still in use by the Piehl Transfer & Storage Company upon its moving vans operating in interstate commerce out of Portland, Oregon, and [73] such simulations of said shield have long been and still are in use by other transfer companies operating in California.

15. The word “national” alone or in conjunction with representations of the colors of the United States in the form of red and white stripes, is not exclusively associated by the public with plaintiff or plaintiff's services.

16. Defendant commenced his transfer and storage business in California in October 1944 under the name "National Van & Storage Co." While defendant's principal operations are within the State of California, defendant also operates nationally by interline arrangements with other transfer companies.

17. On November 7, 1944, with full knowledge of defendant's use of said name "National Van & Storage Co." and with full knowledge of the fact that defendant was operating and would continue to operate his own independent transfer business under such name, plaintiff entered into a written contract, Exhibit 5, with the defendant, which contract remained in full force and effect until February 14, 1950. By virtue of said contract plaintiff engaged defendant as a booking agent, upon a commission basis, to book interstate shipments for plaintiff in plaintiff's name to be handled by plaintiff's moving vans, while at the same time defendant was, with plaintiff's knowledge and acquiescence, carrying on and building up his own transfer business in his own said business name. Said contract was executed by defendant under the name "National Van & Storage Co." and contained a provision to the effect that defendant would not use in his own business name [74] either of the following combinations of words; "National Van", "National Van Lines" or "National Van Lines, Inc." To comply with said provision of said contract, defendant, in November 1944, promptly changed his said business name from "National Van & Storage Co." to

“National Transfer & Storage Co.”, which was done with plaintiff’s knowledge and acquiescence. During 1949, with plaintiff’s knowledge and acquiescence, defendant designed and commenced using on his moving vans and stationery a fanciful and distinctive symbol consisting of an outline map of the United States displaying red and white stripes on the bottom portion of the map. Defendant, with plaintiff’s knowledge and acquiescence, has continued throughout the years to operate and build up his own said individual transfer business under said name from a four-moving-van business grossing \$8,889.81 in 1944 to an 83-moving-van business grossing \$688,267.27 during the first eleven months of 1951, during which time defendant materially increased his investment in his said business. It was not until November 9, 1951 that plaintiff complained to defendant of defendant’s use of said name and symbol and it was not until approximately one year after said complaint that plaintiff instituted this action.

18. The symbol used by defendant, consisting of an outline map of the United States displaying on its bottom portion red and white stripes, is distinctively different from the simulation of the official shield of the United States used by plaintiff.

19. The business name of defendant, “National Transfer & Storage Co.” is merely descriptive of the scope and nature of defendant’s operations and, apart from the geographically [75] descriptive prefix “National” used by both plaintiff and defendant for denoting the scope of their respective opera-

tions, their composite names have no similarity in sound or appearance.

20. Defendant has not committed any act designed or intended to palm off his services as those of plaintiff, or any act intended or designed to deceive, mislead or create any confusion in the mind of the public, but, on the contrary, defendant in good faith and with plaintiff's knowledge and acquiescence, adopted and built up his own business under the descriptive name "National Transfer & Storage Co." and said map symbol, and in so doing has made only fair and lawful use of the generic words comprising said name.

21. Other than possible isolated instances of confusion which might be expected to result among careless observers from the fair and truthful use by plaintiff and defendant, as well as many other transfer companies, of purely descriptive names having a common geographical prefix, there is no likelihood of any confusion occurring in the public mind as between plaintiff and defendant or their services.

22. After said contract, Exhibit 5, was terminated, plaintiff, without defendant's knowledge or consent, caused to be formed in Sacramento, California, another transfer company under the name "National Transfer & Storage Co.", which said company has since continued to operate under said name. [76]

23. Defendant has not committed any act of trade mark infringement against plaintiff.

24. Defendant has not committed any act of unfair competition against plaintiff.

25. Defendant has not in any way violated any provision of said contract, Exhibit 5, between plaintiff and defendant.

26. Approximately six months before the trial of this action, defendant changed the name of his said business from "National Transfer & Storage Co." to "Dean Van Lines" and is no longer using the name "National Transfer & Storage Co."

Conclusion of Law

Defendant is entitled to judgment dismissing plaintiff's complaint and for defendant's taxable costs.

/s/ ERNEST A. TOLIN,
United States District Judge

[Endorsed]: Filed Oct. 19, 1955.

In the United States District Court for the Southern District of California, Central Division

No. 14783-T

NATIONAL VAN LINES, INC., Plaintiff,

vs.

ALFRED E. DEAN, trading under the firm name and style of National Transfer & Storage Co.,
Defendant.

JUDGMENT

This action having come on for trial before the Court commencing December 16, 1954, the Court, having heard and considered the evidence and briefs presented by the respective parties, having made and entered findings of fact and conclusions of law herein, and being fully advised in the premises,

It is hereby adjudged and decreed as follows:

1. Plaintiff's complaint herein is hereby dismissed.
2. Defendant shall recover his taxable costs herein in the sum of \$639.44.

Dated at Los Angeles, California this 19th day of July, 1955.

/s/ ERNEST A. TOLIN,

United States District Judge [78]

[Endorsed]: Filed and Entered Oct. 19, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that National Van Lines, Inc., Plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 19th day of October, 1955.

Burbank, California, October 27, 1955.

Respectfully,

/s/ ALBERT J. FIHE,
 of Counsel for Plaintiff
 KENNETH T. SNOW,
 GERRIT P. GROEN,
 WILKINSON, HUXLEY,
 BYRON & HUME,
 Chicago Attorneys for Plaintiff [79]

[Endorsed]: Filed Oct. 31, 1955.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know all men by these presents, that we, National Van Lines, Inc., as Principal, and the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and authorized to act as surety under the Act of Congress approved August 13, 1894, whose principal office is located in Baltimore, Mary-

land, as Surety, are held and firmly bound unto Alfred E. Dean, doing business as National Transfer & Storage Co., in the full and just sum of Two Hundred fifty and no/100 Dollars (\$250.00), lawful money of the United States, to be paid to the said Alfred E. Dean, doing business as National Transfer & Storage Co., for which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

The condition of this obligation is such, that

Whereas, the above named National Van Lines, Inc., Plaintiff herein, has appealed or is about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from a judgment made and [80] entered against the Plaintiff in the above entitled Court and in the above entitled action, on or about the day of, 1955.

Now, therefore, in consideration of the premises and of such appeal, if the said Plaintiff, National Van Lines, Inc., shall prosecute its appeal to effect, and pay all costs that may be adjudged against it if the appeal is dismissed or the judgment is modified, then the above obligation to be void; otherwise to remain in full force and virtue, and in case of default or contumacy on the part of the Principal or Surety, the Court may, upon notice to them of not less than ten (10) days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed, sealed and dated this 28th day of October, 1955.

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

/s/ By ROBERT HECHT,
Attorney in Fact

Examined and recommended for approval as provided in Rule 8.

/s/ ALBERT J. FICHE, Attorney

Approved this 31st day of Oct., 1955, John A. Childress, Clerk, by Charles E. Jones, Deputy. [82]

[Endorsed]: Filed Oct. 31, 1955.

[Title of District Court and Cause.]

PLAINTIFF'S MOTION TO EXTEND TIME
FOR COMPLETING AND FILING APPEAL

Comes now the Plaintiff and moves this Honorable Court for an order extending the time for completing and filing the Appeal for approximately fifteen (15) days or until December 23, 1955.

Undersigned counsel for Plaintiff has just been notified by the Clerk of the United States District Court that certain papers listed in Plaintiff's Designation of Record on Appeal are not at present available for the Clerk to include in the material to be sent to the Circuit Court of Appeals of the Ninth Circuit.

This material comprises Defendant's Proposed Findings of Fact and Conclusions of Law. It seems that these documents have never been officially filed with the Court. [91a]

It further appears that such filing will be accomplished within the next few days upon which the records can be completed.

A copy of this motion has been mailed to Collins Mason, 811 West 7th Street, Los Angeles 17, California and another copy to C. P. Von Herzen, 453 South Spring Street, Los Angeles 13, California, Attorneys for Defendant.

Burbank, California, December 9, 1955.

/s/ ALBERT J. FIHE,
Of Counsel for Plaintiff

Order

The above motion is approved and it is ordered that Plaintiff have until December 23, 1955 to complete and file its Appeal Record.

Los Angeles, California, December 12, 1955.

/s/ ERNEST A. TOLIN,
Judge, United States District Court

[Endorsed]: Filed Dec. 12, 1955.

[Title of District Court and Cause.]

DOCKET ENTRIES

- 11/26/52—Fld compl for infringement of trademark. Issd Sums. Made Report JS-5.
- 12/ 8/52—Fld Sums—retn svd.
- 12/23/52—Fld stip & ord thereon that dft hv to & incl 1/22/53 to plead.
- 1/26/53—Fld stip & ord thereon that dft hv to & incl 2/24/53 in wh to ans.
- 2/26/53—Fld stip & ord thereon that dft hv to & incl 3/24/53 to plead.
- 3/25/53—Fld mot & not of mot of dft to disp, etc, retble 4/6/53, 10 a.m. with pts & auths thereof.
- 4/ 6/53—Ent predgs & ent ord dnyg defts mot to disp & grntg that portion of mot for more definite stmt.
- 4/23/53—Fld amendment to compl.
- 5/11/53—Fld mot of deft & not of mot retble 5/23/53 at 10 a.m. to disp complt together with memo of pts & auths in suppt thereof.
- 5/20/53—Fld pltfs memo in oppn to defts mot for summy jdgmt.
- 5/25/53—Ent ord hrg on mots ord off cal.
- 9/11/53—Mld notice to counsel pleg on cal 10/5/53 10 a.m., hrg on defts mot to disp compl or in alt for more def stmt, hrtf fld 5/11/53.

- 10/ 5/53—Ent procdgs hrg defts mot to dismiss compl & amendmt to complt or in alt for more def stnt. Ent ord deft hv to 10/9/53 to file addl memo & pltf hv to 10/16/53 in wh to reply, thereafter mots std subm.
- 10/12/53—Fld defts suppl pts & auths.
- 10/13/53—Fld pltfs reply memo.
- 10/15/53—Fld stip & ord pltf hv to & incl 10/26/53 to file addnl reply memo.
- 10/26/53—Fld pltfs reply to defts mot to dismiss or in alt for mor def stnt.
- 12/31/53—Ent ord defts mot to dismiss compl & amendmt to complt etc., htf tkn under subm, denied. Counsel notif.
- 1/15/54—Fld pltf's not of rulg on deft's mot to dismiss.
- 1/16/54—Fld not of ruling.
- 2/ 3/54—Fld Answer. [93]
- 2/10/54—Mld notice to counsel placg on cal for settg 3/1/54, 10 a.m.
- 3/ 1/54—Ent procs & ord settg for pretrial hrg 6/15/54 2 p.m. & for trial 10/26/54, 10 a.m. Issd pretrial ord.
- 6/ 7/54—Fld Stip re pretrial hearg papers.
- 6/10/54—Fld Pltf's simplication of issues & pltf's memo-brief narrative stnt of facts.
- 6/11/54—Fld Deft's pretrial memo.
- 6/15/54—Ent predgs pretrial hrg (in chambers). Fld 17 exbs for pltf. Fld 3 exbs for deft.
- 6/29/54—Fld Deposns of Mary R. Martin & Robert W. Adams tkn 6/12/54.

- 10/ 1/54—On cts own mot ent ord trial date 10/26/54 is vacated & case is contd to 11/15/54, 10 a.m. for re-settg for trial. Counsel notif.
- 10/ 4/54—Fld def't's First Amd Ans & Not of Mot & Ord shortening time to 10/11/54.
- 10/11/54—Ent predgs & ord grtg dfts mot for lv to file amended answer.
- 11/15/54—Fld Def't's req for adms. Ent predgs & ord settg for trial 12/16/54, 2 p.m.
- 12/ 8/54—Fld Repr't's Transe of deposn of E. L. McKee tkn 7/22/54.
- 12/ 9/54—Fld Deposns of Fred L. Ritzmann, John C. Morgan, Harold T. Moss, Joseph S. Ross tkn 12/2/54 with exhibits pertaining thereto & not of tkg.
- 12/13/54—Fld Deposn of Alfred E. Dean, tkn 6/14/54. Fld. Deposn of Abraham Mechanic tkn 12/8/54 at 11:30 a.m.
- 12/14/54—Fld Depsn of MP. Pihl tkn 12/9/54 with Exhibit 1 to 7 incl.
- 12/16/54—Fld Pltf's reply to Def't's req for adms. Ent predgs et trial. Sw 4 wits for plf. Fld 25 exbs for plf. Ent ord fur trial cont 12/17/54, 9:15 a.m. [94]
- 12/17/54—Ent predgs fur trial. Fld exbs for plf. Fld exbs for dft. Sw 3 wits for dft. Ent ord exbs may be withdrawn by counsel during period of briefing. Ent ord plf hv 30 days after receipt of last vol transe to file opening brief, def't hv 30 days to

- answer, plf hv 15 days thereafter to file reply, whereupon matter will stand subm.
- 12/27/54—Fld Deft's Mot retble 1/10/55 to amend answer to conform to proof.
- 1/10/55—Ent precdgs & ord denyng mot dft for lv to file amendmt & suppl to 1st amended answer.
- 1/12/55—Fld Rect of Albert J. Fihe for withdrawal of all Deft's & Pltf's Exhibits.
- 2/14/55—Fld Pltf's Brief.
- 3/11/55—Fld Deft's Brief. Fld Clk's copy of reporters transcript of precdgs for 12/16/54 & 12/17/54 (2 vols).
- 3/23/55—Fld Plf's reply brief.
- 6/21/55—Ent ord, matter hvg been tkn under subm aft trial, jdgmt be ent in fv of deft & for defts costs. Atty for dft to prep findgs, & jdgmt pur Local R-7. Counsel ntfld.
- 8/ 9/55—Fld plfs memo suppt altern findgs etc. Lodged prop findgs and jmt.
- 8/15/55—Fld Deft's Memo Opposg Findings of Fact & Concls of Law Proposed by Pltf.
- 10/19/55—Fld finds fact & concls law & fld, dktd & ent judg dismiss plfs complt & fv deft for costs. Not attys. JS6.
- 10/24/55—Fld defts cost bill with affid of C. P. Von Herzen.
- 10/26/55—Not of ent of judg of 10/19/55 to Messrs Turrentine, Von Herzen et al, orig mld atty Turrentine remld to atty Von Herzen, same address.

- 10/31/55—Taxed costs fv deft in amt \$639.44 on hrg, & ent same in judg. Fld memo by Clk re taxing. Fld plfs not of appeal & fld plfs stip for costs in amt of \$250 surety bond. Mld cy of not of appeal to dfts attys Howard B. Turrentine, C. P. Von Herzen & S. L. Laidig, Rm 725, 453 So. Spring St., LA 13, Calif.
- 11/15/55—Fld plfs design for Record on Appeal.
- 11/21/55—Fld defts design of addnl ports of rec on app.
- 11/29/55—Fld plfs supplmtl Design of Rec on App.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 95, inclusive, contain the original

Complaint;

Motion & Notice of Motion to Dismiss, etc.;

Amendment to Complaint;

Motion & Notice of Motion to Dismiss, etc.;

Answer;

First Amended Answer;

Plaintiff's proposed Findings of Fact, etc.;

Plaintiff's Memo in Support of Suggested Alternate Findings, etc.;

Defendant's Memo opposing Findings of Fact,
etc.;

Findings of Fact & Conclusions of Law;

Judgment;

Notice of Appeal;

Plaintiff's Designation for Record on Appeal;

Defendant's Designation of Additional Portions
of Record;

Plaintiff's Supplemental Designation for Record;

Plaintiff's Motion to Extend time for completing
& filing appeal; and a full, true and correct copy of
the Minutes of the Court on December 31, 1953;
March 1, 1954; June 15, 1954; Bond for Costs on
Appeal; Docket Entries; Letter dated June 21,
1954 from Judge Tolin's Clerk; which, together
with 2 volumes of reporter's transcript; Plaintiff's
exhibits 1-38, 40-52, and 54-57; defendant's exhibits
A-00, inclusive, in the above-entitled cause, consti-
tute the transcript of record on appeal to the
United States Court of Appeals for the Ninth Cir-
cuit, in said Cause.

I further certify that my fees for preparing the
foregoing record amount to \$2.00, which sum has
been paid by appellant.

Witness my hand and the seal of said District
Court, this 13th day of December, 1955.

[Seal]

JOHN A. CHILDRESS,
Clerk

/s/ By CHARLES E. JONES,
Deputy

In the United States District Court for the Southern District of California, Central Division

No. 14,783-T

NATIONAL VAN LINES, INC.,

Plaintiff,

vs.

ALFRED E. DEAN, trading under the firm name and style of National Transfer & Storage Co.,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, December 16, 1954

Honorable Ernest A. Tolin, Judge presiding.

Appearances: For the Plaintiff: Gerrit P. Groen, 38 Dearborn St., Chicago, Ill., and Albert J. Fihe, 1023 Victory Pl., Burbank, Calif. For the Defendant: C. P. Von Herzen, 453 S. Spring St., Los Angeles, Calif., and Collins Mason, 811 West 7th St., Los Angeles, Calif. [1*]

The Court: Call the case, please.

The Clerk: 14,783, National Van Lines, Inc., vs. Alfred E. Dean, trading under the firm name and style of National Transfer & Storage Co., for trial.

Mr. Mason: Ready for the defendant.

Mr. Fihe: Ready for plaintiff.

Your Honor, I suppose you remember Mr. Groen

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

of Chicago, who is here for the plaintiff, and he will try the case. He was here at the pretrial hearing, you will recollect.

The Court: I do recollect, but the moment I came to the bench I didn't. I wondered who was replacing Mr. Fihe.

Mr. Groen: We are together. [2]

* * * * *

I am ready to proceed with my first witness.

The Court: Do you want to make your statement?

Mr. Mason: I will withhold my statement until I open the defense, unless your Honor wants it now.

The Court: I don't care, whatever you prefer.

Mr. Groen: I will call Frank McKee. [14]

FRANK L. McKEE

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated, please.

Your full name, sir?

The Witness: Frank L. McKee; M-c-K-e-e.

Direct Examination

By Mr. Groen:

Q. Will you please state your occupation, Mr. McKee?

A. President of the National Van Lines, Inc.

Q. How long have you served in that capacity?

A. Sixteen years.

Q. Were you with the company prior to serving

(Testimony of Frank L. McKee.)

in the capacity of president? A. Yes, sir.

Q. Were you with it from its inception?

A. No,—well, yes; shortly after.

Q. Was there a predecessor company to the present National Van Lines, Inc.?

A. Yes, sir.

Q. Who was that predecessor?

A. National Shippers and Movers.

Q. Was that a corporation?

A. Yes, sir.

Q. Did it start as a corporation? [15]

A. No, sir.

Q. Will you tell us the history of the organization of National Shippers and Movers and its subsequently being taken over by the National Van Lines, Inc.?

A. The business of National Shippers and Movers was started by F. J. McKee, my father, in 1928, the end of the year, and was later incorporated. I don't recall what date.

Subsequently it was changed to National Van Lines, Inc.; incorporated in June 1934. I believe that is the date.

Q. The name National was adopted and used back in 1928, you say is your best recollection?

A. Yes.

Q. As part of the firm name that was then unincorporated as National Shippers and Movers, is that right? A. Yes.

Q. And that name, either as a proprietorship

(Testimony of Frank L. McKee.)

or as a corporation, continued until 1934, when National Van Lines, Inc. was organized?

A. Yes, sir.

Q. Did National Van Lines, Inc. take over all the assets of National Shippers and Movers?

A. It did.

Q. Was National Shippers and Movers then dissolved or the charter surrendered?

A. Yes, sir. [16]

Q. Was that immediately or later on, speaking of the 1934 date? A. Immediately.

Q. When was the vertical stripe design first employed, which I am illustrating here, Exhibit 15, for the plaintiff?

A. The best of my recollection, about 1930.

Q. It was not used immediately when National Shippers and Movers was organized?

A. No, sir, not immediately.

Q. It was in the early '30's that the stripes were added to the word National? A. Yes, sir.

Q. Will you describe briefly the type of business this is?

A. The transportation of household goods interstate.

Q. Are you limited to that specific thing?

A. Yes, sir.

Q. Why?

A. The certificate is for the movement of household goods and commodities coming under that classification.

(Testimony of Frank L. McKee.)

Q. And you are limited because of Interstate Commerce Commission regulations, are you not?

A. Yes, sir.

Q. You can't haul freight?

A. No, sir. [17]

Q. Is that true of others in this business?

A. That is right.

Q. You have a franchise for one thing or the other? A. Yes, sir.

Q. And you also do storage business?

A. Yes, sir.

Q. Explain just what kind of moving this is. Is it for the general public or corporations or what?

A. It is for the general public and for corporations, which we call commercial accounts or national accounts, and for the Government, transferring the personnel of the armed forces.

Q. And still the same type of business, but one you contract directly with the private owner, and the other with the Government, for the moving of private parties? A. Yes.

Q. You also contract with corporations for moving employees? A. Yes, sir.

Q. Is there much—strike that.

Can you tell us approximately how much business goes into each one of these categories you have named? You have named three.

A. Yes. The national account is somewhere around five or eight per cent. And the Government business is about [18] thirty-five, and the balance is of the general public or C.O.D.

(Testimony of Frank L. McKee.)

Q. Can you tell us about the growth of your organization? Have you experienced a growth since 1934, when the present company was incorporated?

A. Yes, sir.

Q. To what extent? Did you cover the 48 States then or did that come about later?

A. In 1934 certificates had not as yet been issued by the Interstate Commerce Commission. We received our certificate in 1942.

In the meantime all movers continued transporting goods wherever their work would take them and under what rights they thought they were entitled to.

But when our certificate was issued, we received 30 States and the District of Columbia. And later we applied, under convenience and necessity application, for the balance of the States, some nine States, and were granted that authority in 1950.

Q. Is it correct to say then that today you do business in each of the 48 States?

A. Yes, sir.

Q. Is there any one State where the business is most heavily concentrated?

A. The greatest concentration of business is in the [19] State of California.

Q. Will you explain why that is in your case?

A. For years there has been a westward trend and the State of California has built up because of that westward trend. And we did our share in bringing the people to California.

Q. Is there any particular reason why you

(Testimony of Frank L. McKee.)

should stress the business you do, in-and-out business?

A. Yes, we do in-and-out business. We have worked hard to try to get a balanced traffic, so that our equipment would not have to go back empty or only partially loaded; back to the East from which they came.

Q. In other words, there is a natural flow west, or there has been? A. Yes.

Q. And because so many trucks come out loaded you have to work hard to get business going back, is that it? A. That is true.

Q. Referring again to Plaintiff's Exhibit 15, how long was that composite mark of National and the stripe design used in your business?

A. The present company?

Q. Well, the present company had it at its inception. A. Yes.

Q. Was it used prior to that, also? [20]

A. Yes, sir.

Q. And did you obtain registrations for that mark? A. We did.

The Clerk: Plaintiff's 3-A and 4-A for identification.

(The documents referred were marked Plaintiff's Exhibits 3-A and 4-A for identification.)

Mr. Groen: If the court please, I have handed the witness certified copies of the two registrations for the service marks in suit. They are exhibits attached to the Complaint. Previously soft copies were introduced in evidence as Exhibits 3 and 4.

(Testimony of Frank L. McKee.)

I have now given the witness the certified copies as 3-A and 4-A.

Q. By Mr. Groen: Now, Mr. McKee, referring to 3-A first, that is a true representation of the service mark as you are using it today?

A. Yes.

Q. And have used it for many years?

A. Yes, sir.

Q. Are you still the owner of that mark and the registration therefor? A. Yes, sir.

Mr. Mason: I object to that as calling for a conclusion.

The Court: Sustained.

Q. By Mr. Groen: Have you ever assigned this mark to anyone else? [21] A. No, sir.

The Court: I reverse that. I think anyone can testify as to ownership, can't they? To testify they are the owner of the property.

Of course, it is their testimony. We will have to come to the conclusion after we hear what the evidence is on the subject.

Mr. Groen: The evidence shows they were taken out in their names. He just testified they never assigned it to anyone else.

The Court: All right.

Q. By Mr. Groen: You license agents to use this mark? A. Yes, sir.

Q. Now, referring to Exhibit 4-A, that is Registration No. 563,950, was that taken out by your company? A. Yes, sir.

(Testimony of Frank L. McKee.)

Q. Have you ever assigned that to anyone else?

A. No, sir.

Q. So far as you know, you are still the owner?

A. Yes, sir.

Q. Does National use any other mark in its business, except that as shown in the registration, 3-A, that you have before you, or which is reproduced as Plaintiff's Exhibit 15, which I am showing you?

A. No, sir. [22]

Q. Has that mark been used continuously, that is, National and the stripe design?

A. Yes, sir.

Q. From the time you started with this company in 1934?

A. Yes, sir.

Q. And it was also used by the predecessor prior to that?

A. Yes, sir.

Q. Will you explain how National Van Lines, Inc. operates, Mr. McKee, that is, you have direct business and you have agents. Will you just unfold that and develop it for the court, please?

A. We have company offices that develop their share of bookings and these agents, in excess of 200, also book shipments for National Van Lines, and—

Q. Where are these agents?

A. In various parts of the country.

Q. You say over 200?

A. Yes.

Q. How many in the State of California, roughly?

A. Forty-three.

Q. You are referring to a memorandum to refresh your memory there (indicating)?

(Testimony of Frank L. McKee.)

A. To the roster, yes. [23]

Q. How do you operate directly, as distinguished from the operations as to agents? When I say "you" I mean your company.

A. The agents in most cases are just local movers with no interstate rights, and they are not in competition with us; those that have no authority.

Those that have a few States, and there are some that have a few, operate on their own authorities and book for themselves.

Q. In other words, an agent solicits local business, is that right? A. Yes, sir.

Q. And then how does it get to National Van Lines, Inc., or how do you continue with the business as solicited by the agent?

A. He will book the order on our order for service form and register that order with the regional office under whose direction he comes.

Q. Then you also book work directly by your own firm, is that right?

A. Yes, our own office books work directly.

Q. Where do you maintain offices directly?

A. In New York, Washington, Dallas, Chicago, Los Angeles.

Q. How many trucks do you operate, or perhaps we [24] should distinguish trucks from the vans. Will you explain that, please?

A. There are some straight vans, but the majority are tractor-trailer units. There are some 266 complete units in the service of National Van Lines.

(Testimony of Frank L. McKee.)

Q. Do all those trucks or units bear the service mark National and stripe design? A. Yes.

Q. On the truck and the tractor, if they are separate units? A. Yes, sir.

Q. What material do your agents use that shows a connection between your firm and the agency?

A. All of the advertising material that we distribute to them for their direct mailing program or for their distribution among shippers is that of National Van Lines. And letterheads. Recently, a television film, and a radio disk. We supply the decals for the vans that they paint up to match the fleet in color and design.

And we assist them in the purchasing of packing materials with company emblems on that material.

Q. Do you have some of this material here you are going to produce?

A. We have a picture of some material, yes.

Q. Did you ever have an agency agreement with Alfred [25] Dean? A. Yes, sir.

Q. When was this agreement entered into, do you recall? A. In 1944.

Q. How long did it exist? A. Until 1950.

Q. Who canceled it? A. Mr. Dean.

Q. Do you remember the reasons for cancellation?

A. Well, Mr. Dean was disturbed at that time because—I believe because he wasn't getting settlement as fast as he could make use of the money.

Q. Well, explain that a little more fully. What do you mean?

(Testimony of Frank L. McKee.)

A. Usually we settle once a month, about the 10th of the succeeding month, time in which to get the accounts in order.

Mr. Dean was pretty well advanced in his work, having done a great deal of packing, and was in need of financial relief for the moneys he had paid out.

Q. It was largely a question of prompt remittances then?

A. Yes, I think that he must have had some promise of some other arrangement for that, to cover the financial need. [26]

Q. You know nothing about that personally?

A. No, I don't.

Q. Then don't testify about it. You paid him once a month and he wanted payment sooner than that, is that it? A. As I recall.

Q. I will show you a contract marked Plaintiff's Exhibit 5, and ask if that is the original contract between your firm and Dean, then known as National Transfer & Storage? A. Yes, sir.

Q. Does that have a notation on the front of it that it was canceled? A. Yes, sir.

Mr. Von Herzen: May I be permitted to approach the witness chair and examine the contract?

The Court: Surely. This has been in our file for six months. but come up again and see it if you wish.

Q. By Mr. Groen: You acknowledge that that contract was cancelled on February 20, 1950, then?

A. Yes, sir.

(Testimony of Frank L. McKee.)

Q. Are agents encouraged to use the name and stripe design mark when they operate for you?

A. Yes, sir.

Q. And Dean was encouraged the same way as any other agent in that respect? [27]

A. Yes, sir.

Q. Will you explain through what channels you advertise, Mr. McKee?

A. Practically every form of advertising, trade journals, newspaper, radio, television.

Q. Do you use directories?

A. Yes, telephone directories. Concert programs. Anything you can get your name on.

Q. Do you use the mark National and the vertical stripe design in your advertising throughout?

A. In everything.

Q. Now, I will bring up some of the pieces in a moment, but I would like to do that at one time.

Referring to defendant's activities since the cancellation of the agency agreement, do you know of any occasion of receiving telephone calls or mail that was intended for defendant, that you got or that defendant got some of yours, or your company's?

A. I can't recite any specific instance, but instances did come to my attention. They would be much better in the mind of the first person.

Q. Who would know specifically who they were?

A. Mr. Bock of Los Angeles. He would be one, or Bob Adams, manager of the San Francisco office, was another.

(Testimony of Frank L. McKee.)

Q. Do you personally know there were mis-directed [28] telephone calls and letters, and the like? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

Q. And they know about the details?

A. Yes, sir.

Mr. Groen: If the court please, I could save a little time by going through a number of exhibits, if I could stay right near the witness.

The Court: Surely.

Q. By Mr. Groen: Mr. McKee, I am going to show you several exhibits. This has already been admitted as No. 1 for plaintiff. Those are true representations of letterheads or parts of letterheads of both plaintiff and defendant? A. Yes.

Q. Here are groups of pages from the telephone directories of Los Angeles and San Francisco, that have been admitted previously as Exhibit 2 for plaintiff. Are you familiar with those?

A. Yes, sir.

Q. Does that show both plaintiff's and defendant's ads? A. Yes, sir.

Q. National and the stripe design?

A. Right. [29]

Q. Here are some pages, identified or admitted as Exhibit 6 previously, in the San Diego telephone directory. I will ask you if you are familiar with those. A. Yes, sir.

Q. They show both plaintiff's and defendant's ads with National and the stripe design?

A. Yes, sir.

(Testimony of Frank L. McKee.)

The Court: Where is the defendant's?

The Witness: Here is the defendant's (indicating).

The Court: Where is yours?

The Witness: 334 is theirs, and here is ours on page 333, right here (indicating).

Q. By Mr. Groen: I am handing you what purports to be a letterhead of plaintiff's, Exhibit 7-A. Is that a true letterhead you are using today, showing your composite mark? A. Yes, sir.

Q. I am handing you another letter——

A. Pardon me. One exception. We have made a change recently of letterheads.

Q. Did you change the mark on it?

A. No, not the mark; it is the style of it.

The Court: Style of what?

The Witness: Style of the letterhead. You have that sample copy, Mr. Groen. I don't have it.

The Court: Was the style of the mark changed?

The Witness: No, no.

Q. By Mr. Groen: Is this the one you are referring to (indicating)?

A. This is our latest letterhead.

The Court: You had better give that a number.

Mr. Clerk, will you mark it, please?

The Clerk: 7-C.

(The document referred to was marked Plaintiff's Exhibit 7-C for identification.)

Mr. Groen: Did you see this, Mr. Von Herzen?

Mr. Von Herzen: No.

(Testimony of Frank L. McKee.)

Mr. Groen: It is 7-C, just marked for identification.

Q. By Mr. Groen: That is the letterhead you are currently using?

A. Yes, sir. It is also being used by the agents.

Q. Have you seen this letterhead of defendant, Exhibit 7-B, before? A. Yes, sir.

Q. You have seen that in the normal course of business in your correspondence with them?

A. Yes, sir.

Q. I am showing you a picture which has previously been admitted, I believe, as Plaintiff's Exhibit 8.

Will you explain to the court what that is, please?

A. This is a picture of one of the early units that [31] made trips to California from the East. It shows the emblem in connection with National Shippers and Movers.

Q. How old would you say that is?

A. This picture dates back to perhaps 1931, '30 or '31.

Q. Showing you another exhibit marked for identification as Plaintiff's Exhibit 9, is that a true copy of the Articles of Incorporation for National Van Lines, as it exists today?

A. Yes, sir; June '34, the date of incorporation.

Q. Here is a document previously marked for identification as Plaintiff's Exhibit 10. Explain what that is, please.

A. This is one of the early shipping orders dated

(Testimony of Frank L. McKee.)

October 3, 1932, under the name of National Shippers and Movers; a movement to Los Angeles.

The Court: I see that several of these exhibits are National Shippers and Movers.

Mr. Groen: The predecessor company.

The Court: You are not contending that to be a previously or to be a presently infringed mark, are you?

Mr. Groen: No. That has been abandoned. This present plaintiff has taken over all the assets, as Mr. McKee has testified to.

The Court: All right. This is just history? [32]

Mr. Groen: Yes. It is early use, however, of National and stripe design. That is what it is being offered for.

Q. By Mr. Groen: Look at this document marked Exhibit 11 for plaintiff, and tell us briefly what that is.

A. This is a shipping document for movement of household goods from Chicago to Los Angeles, under date of November 15, 1932.

Q. Look at this document marked Exhibit 12. Tell us what that is, please.

A. This is a freight bill dated November 24, 1937.

Q. National Van Lines, Inc.?

A. National Van Lines, Inc.

Q. Look at this document, No. 13, and explain what that is, please.

A. This is an invoice, or freight bill—pardon me. The previous one was a bill of lading. This is

(Testimony of Frank L. McKee.)

a freight bill dated November 25, 1937; National Van Lines, Inc.

Q. Handing you another document, Mr. McKee, marked Plaintiff's Exhibit 14, will you explain what that is?

A. This is a picture of a tractor-trailer unit. That shows the fleet color and design.

Q. As currently used, is it?

A. As currently used; showing the style of all equipment.

Q. Look at this document marked No. 15 and explain [33] what that is, please.

A. This is my own personal card.

Q. Showing the National and stripe design?

A. Showing the National Van Lines insignia in stripes, red and white stripes.

Q. Look at this document marked Plaintiff's Exhibit No. 16, which purports to be a collection of pages from telephone directories.

Will you run through those quickly, please, and tell us what they show?

A. This is a page from a Chicago directory showing our ad. That was the first one.

The second one is also a Chicago page, from a directory, telephone directory.

The third one is also a Chicago directory page, showing our ad.

The next is a New York ad of ours; New York directory ad.

Mr. Groen: These documents marked Exhibits

(Testimony of Frank L. McKee.)

1 through 16, inclusive, just referred to by the witness, are offered in evidence.

The Court: Received. Some of them have been received before.

Mr. Groen: Yes.

The Court: But I notice some of them are only marked [34] for identification, so we had better have them checked over, Mr. Clerk, and see they bear the "Received" stamp.

(The documents heretofore marked Plaintiff's Exhibits 3-A, 4-A, 6, 10, 11, 12, 13, 14, and 16 were received in evidence.)

Q. By Mr. Groen: Now, Mr. McKee, I am handing you a booklet marked, previously marked Plaintiff's Exhibit 17 for identification.

Shall we go through that quickly and identify the pages. What is the first unit?

A. The first page is a blotter.

Q. That is distributed in any quantities by your firm?

A. Yes, I think the last order was about 25,000.

Q. Your agents used that, also?

A. Yes.

Q. Look at the next unit and tell us what that is.

A. That is an estimate sheet that goes out to all offices and agents, that is used to secure business.

Q. That illustrates a picture of your van line, too? A. Yes.

Q. The next item is an envelope showing your trademark? A. Yes.

(Testimony of Frank L. McKee.)

Q. The next is a letterhead, the same as you identified before? [35]

A. Yes.

Q. Another photograph of one of your van lines, the next one? A. Yes, one of the units.

Q. Explain this document (indicating).

A. That is an advertising piece called, "15 Helpful Hints". It is distributed among the trade.

Q. You have a note here, "64,000 Distributed in 1954". A. That is right.

Q. Is that a typical quantity in which those are distributed?

A. Yes, but we had much more than that, but that amount was distributed in '53.

Q. Your agents used those?

A. Yes, sir.

Q. What is this document on this sheet?

A. A postal card. The distribution for that in '53 was 41,500.

Q. Look at this document. What is this?

A. This is another estimate sheet. It preceded the other; replaced by the other one.

Q. What is this booklet contained inside here?

A. That is a give-away item to the trade, and it is entitled "Pioneer's Progress".

Q. Does that bear your service mark? [36]

A. It does, and it also has a picture of a van in the center portion.

Q. Has that booklet been distributed rather widely? A. Yes, sir.

Q. Through your agents?

(Testimony of Frank L. McKee.)

A. To agents in offices. We are on the second issue of that book.

The Court: How many were printed on the first issue?

The Witness: The first, I think about 35,000.

The Court: Were they all distributed?

The Witness: Yes.

The Court: How many have been printed in the second issue ?

The Witness: I think an equal number. And we have about 30,000 on hand at the present time.

The Court: You have just started on the second issue?

The Witness: Yes.

Q. By Mr. Groen: What is this document I am referring to (indicating)?

A. That is a commercial or national account item, and distribution of 20,000 in 1953.

Q. Here is a sheet with respect to advertising. Is that a typical tabulation of telephone directory advertising in the cities, and the quantity?

A. Yes. [37]

Q. Cities mentioned and the quantity you take?

A. Yes.

Q. Is that typical? A. Yes.

Q. That says Chicago and suburbs, Dallas, Washington, Los Angeles and suburban directories——

A. Yes, there are four Chicago directories. And that has been increased recently.

In New York there are four boroughs; I think

(Testimony of Frank L. McKee.)

we increased that just recently, including two more books.

And there is Dallas, Washington, Los Angeles—Los Angeles there are eight suburban directories.

San Francisco, Sacramento, Elizabeth, New Jersey; Patterson, New Jersey, and Hackensack.

Q. This next page is another typical sheet from a classified telephone directory? A. Yes.

Q. Showing your ad, is that right?

A. Yes; that is from a Chicago directory.

Q. Insofar as all these telephone directory and trade directory ads are concerned, your stripes are always shown in alternate black and white stripes, are they not? A. Yes, sir.

Q. Here are several pages of what appear to be magazines. Traffic World. [38]

A. Yes, sir.

Q. Sales Management, and the like.

A. Right.

Q. What are those in there for?

A. That shows the advertising done with those trade journals.

Q. Is that a typical trade journal advertising?

A. Yes. Here is Sales Management (indicating).

The Court: You have gotten over into another section, haven't you?

Mr. Groen: No; the same book.

The Court: What is the number?

Mr. Groen: 17.

The Witness: Business Week, and Transport Topics.

(Testimony of Frank L. McKee.)

Q. By Mr. Groen: Now, you have been referring to Exhibit 17, identifying each of these separate pieces? A. Yes, sir.

Q. That is all contained in this brown covered book? A. Yes.

Q. This is an illustration of typical advertising that you use? A. Yes, sir.

Q. In connection with telephone directories, do you have to order your space and give your advertisement far in advance? [39] A. Yes.

Q. How far in advance?

A. I think the last change you can make is 30 days before closing time, but you have to have your—I think you have to have your cuts in before that.

Q. How long do they stay out once you give them?

A. Those vary. There are a few books that go, still go for only six months, but many of them go for nine months and a year.

Mr. Groen: The court please, I have another series of additional ads that haven't—and material that haven't been marked, if I may take a moment.

The Court: All right. Have the clerk mark them.

The Clerk: Plaintiff's 18.

(The documents referred to were marked Plaintiff's Exhibit 18 for identification.)

Mr. Groen: Exhibit 18 is a collection of pages from the classified Los Angeles telephone directory.

The Clerk: 19.

(Testimony of Frank L. McKee.)

(The document referred to was marked Plaintiff's Exhibit 19 for identification.)

Mr. Groen: Exhibit 19 is a sheet of statistics on advertising.

The Clerk: 20.

(The document referred to was marked Plaintiff's Exhibit 20 for identification.) [40]

Mr. Groen: Exhibit 20 is a currently-used pamphlet of National Van Lines advertising.

Mr. Mason: The telephone directory, is there anything on there to denote the year?

Mr. Groen: This last one is marked——

The Clerk: 21.

(The document referred to was marked Plaintiff's Exhibit 21 for identification.)

Mr. Groen: ——Exhibit 21. It is another pamphlet.

The Clerk: 22.

(The document referred to was marked Plaintiff's Exhibit 22 for identification.)

Mr. Groen: Exhibit 22 purports to be a further pamphlet used by plaintiff.

The Clerk: 23.

(The document referred to was marked Plaintiff's Exhibit 23 for identification.)

Mr. Groen: Exhibit 23 is an advertising piece showing how National Van Lines advertises at entertainments.

The Clerk: 24.

(The document referred to was marked Plaintiff's Exhibit 24 for identification.)

(Testimony of Frank L. McKee.)

Mr. Groen: Exhibit 24 is another advertising piece showing means of publicity for National Van Lines.

The Clerk: 25. [41]

(The document referred to was marked Plaintiff's Exhibit 25 for identification.)

Mr. Groen: Exhibit 25 is a circular of the Fruehauf Trailer Company, showing a series of moving vans and how they use our trade-marks.

The Clerk: 26.

(The proof referred to was marked Plaintiff's Exhibit 26 for identification.)

Mr. Groen: Exhibit 26 is a proof of a mat distributed by National Van Lines to its agents.

The Clerk: 27.

(The proof referred to was marked Plaintiff's Exhibit 27 for identification.)

Mr. Groen: Exhibit 27 appears to be another proof of a mat distributed by National Van Lines currently.

The Clerk: 28.

(The calendar referred to was marked Plaintiff's Exhibit 28 for identification.)

Mr. Groen: Exhibit 28 is a calendar used by National Van Lines.

The Clerk: 29.

(The photograph referred to was marked Plaintiff's Exhibit 29 for identification.)

Mr. Groen: Exhibit 29 is a photograph.

The Clerk: 30. [42]

(Testimony of Frank L. McKee.)

(The photograph referred to was marked Plaintiff's Exhibit 30 for identification.)

Mr. Groen: Exhibit 30 is——

The Witness: Mr. Groen, does that have to go in? That is the original.

Mr. Groen: Exhibit 30 is a photograph showing packaging material used by National Van Lines.

The Clerk: 31.

(The document referred to was marked Plaintiff's Exhibit 31 for identification.)

Mr. Groen: Exhibit 31 is Certificate of Public Convenience and Necessity, issued by the Interstate Commerce Commission.

The Clerk: 32.

(The document referred to was marked Plaintiff's Exhibit 32 for identification.)

Mr. Groen: Exhibit 32 is a tabulation of National Van Lines tonnage, state for state.

The Clerk: 33.

(The document referred to was marked Plaintiff's Exhibit 33 for identification.)

Mr. Groen: Exhibit 33 is a document showing state by state and the number in each.

The Clerk: 34.

(The document referred to was marked Plaintiff's Exhibit 34 for identification. [43])

Mr. Groen: Exhibit 34 is a tabulation of advertising expenses, 1944 through 1955.

The Clerk: 35.

(The document referred to was marked Plaintiff's Exhibit 35 for identification.)

(Testimony of Frank L. McKee.)

Mr. Groen: Exhibit 35 is a tabulation of gross business for the years 1939 through 1954.

Q. By Mr. Groen: Now, Mr. McKee, will you run through those quickly and just tell us what that is (indicating)? I am handing you 18.

A. This is a section of the classified directory of Los Angeles for the issue August 1954.

Q. Will you show it to the court, please, and point out your ad and that of the defendant?

A. (Witness complies.) This is defendant's ad, and this is our ad, on page 1058 (indicating).

Q. Look at this document, No. 19, and tell us what that is, please.

A. This is a recap of the circulation, magazines and newspaper.

Q. Does that show current advertising expenditures?

A. It is for space advertisements in 1953.

The Court: Space advertisements of what and by whom?

The Witness: Advertising Age, Business Week, Sales Management,— [44]

The Court: I can read that. But what is advertised? What is the material that is advertised?

The Witness: What we showed in this section here (indicating).

Mr. Groen: You are referring to Exhibit 17, the last pages in that?

The Witness: Yes, sir, Sales Management; this is the ad. And this is Traffic World; this is the ad (indicating).

(Testimony of Frank L. McKee.)

The Court: Then this other exhibit that you were referring to here, Exhibit 19, is a record showing the issues in which these advertisements appeared?

The Witness: Yes.

The Court: And reported circulation?

The Witness: Right.

The Court: Of the particular publications?

The Witness: Yes, sir.

The Court: All right.

Q. By Mr. Groen: Now, look at this pamphlet marked Exhibit 20, and tell us what that is, please.

A. This is an advertising piece that is distributed among the trade and is to assist the shipper in preplanning a move.

The Court: What is the number of that?

Mr. Groen: Exhibit 20.

The Court: We will take a short recess.

(Short recess taken.) [45]

The Court: My secretary had sent me a note there was a party that had a matter of great urgency. I found it was a very brief matter. They just wanted to pay their respects. I am anxious not to take a long recess today because we have the adjournment at 4:00, and it is my understanding that you had desired to finish this case this week.

Mr. Groen: We do, and we are going to cooperate.

The Court: We will run through until 4:00, and tomorrow I will start as early as you feel you can be ready.

(Testimony of Frank L. McKee.)

Mr. Groen: Any time your Honor says.

The Court: 9:00 o'clock, is that too early?

Mr. Mason: 9:15; I can make it.

The Court: 9:15 tomorrow.

Q. By Mr. Groen: Look at this document, Exhibit No. 21, Mr. McKee. A. Yes, sir.

Q. What is that?

A. It is an advertising piece that is distributed among the trade, all types.

Q. Does that show your composite mark?

A. It does.

Q. It is not in red, white, and blue?

A. No, sir.

Q. It is blue and white and black?

A. Yes, sir. [46]

Q. Look at this piece marked Exhibit 22, and will you tell the court what that is, please?

A. This is an advertising piece that goes out to prospective agents.

Q. Is that circulated widely?

A. Yes, sir.

Q. Look at this exhibit marked 23. Will you tell us what that is?

A. This is a program in which our agent Cherry Transfer has our emblem as an advertisement on one of the pages.

Q. Look at this document marked Exhibit 24, and will you tell the court what that is, please?

A. This is the result of publicity that we received on television twice this past year. Both

(Testimony of Frank L. McKee.)

times the broadcast was to some forty million people and——

Q. What program was that?

A. "This Is Your Life," Ralph Edwards' show.

The Court: How did this piece of literature, Exhibit 24, figure in the broadcast?

The Witness: We developed that later, to continue with the advertising that we received from the original medium.

The Court: And this Exhibit 24 then was circulated some?

The Witness: Yes; that is a mailing piece and it is also given out by hand to the trade. [47]

Q. By Mr. Groen: Look at Exhibit 25 and tell the court what that shows.

A. This is an advertisement made up by Fruehauf Trailers and shows seven units of various national lines, including the unit, picture of the units of National Van Lines, Inc.; fourth one down.

Q. Look at this document, Exhibit 26, and explain what that is, please.

A. This is a copy of a mat used in newspaper advertising and it is distributed among the agents.

Q. Look at Exhibit 27 and explain that, please.

A. This is a sample of what the setup should be for agents using the cuts in the center of the sample.

Q. Look at Exhibit 28 and explain that, please.

A. This is for telephone directory, that Exhibit 27. This is another advertisement, advertising piece,

(Testimony of Frank L. McKee.)

a calendar for 1955, and it is just being distributed. I think there are 50,000 of those.

Q. What is this photograph marked Exhibit 29, please?

A. This is another publicity for National, in which case our van was used by a television broadcasting show, "Truth or Consequences", and the units went across the country, from Los Angeles to New York, and stopped at some thirty cities en route, and in each instance the public marched through the van. [48]

The Court: Did you have the trade-mark inside the van?

The Witness: I think the operators on the truck had their uniforms with trade-marks.

Q. By Mr. Groen: Looking at that photograph, Exhibit No. 30, explain to the court what that contains.

A. This is a display of packing materials of National Van Lines, on which the trade-mark is shown in each instance.

Q. What type of units do you find there exhibited in that photograph?

A. There is a barrel and mattress cartons and lamp shade cartons, a wardrobe carton, a pad thrown over the top of one of the cartons. That doesn't have the emblem, but has the name, and the employee has the emblems on his uniform.

Q. Is that typical of how you use your mark National and the stripe design?

A. Yes, sir.

(Testimony of Frank L. McKee.)

Q. Look at this document marked Exhibit 31, and tell us briefly what that is.

A. This is a copy of our Certificate of Public Convenience and Necessity from the Interstate Commerce Commission, the last one issued.

Q. Look at this Exhibit 32, please. Will you explain what that represents?

A. That represents tonnage per State outbound and inbound for the year 1953. [49]

Q. That is a typical year's work, is it?

A. Yes.

Q. What do you mean by inbound and outbound?

A. Shows the amount of tonnage that goes into a State and how much tonnage is transferred from the State.

The Court: You mean by use of your equipment that bears the trade-mark?

The Witness: Yes, sir, by the equipment of National Van Lines, Inc.

Q. By Mr. Groen: That shows California from five to six million in and out, is that right, roughly?

A. Yes.

Q. That is by far larger than any of the others on there? A. Yes, sir.

Q. The next highest is New York or Texas?

A. The next highest would be——

Q. Illinois?

A. I believe Illinois.

Q. Illinois, Texas, New York, and the largest is California, is that right?

(Testimony of Frank L. McKee.)

A. Right.

Q. Look at this document, Exhibit 33, and explain that, please.

A. This shows the number of agents per State, and [50] there is one State missing, the State of Minnesota, in which there are 11 agents.

Q. Look at this document, Exhibit No. 34, and explain what that is, please.

A. This shows the advertising cost per year, starting with the year 1944, up to and including an estimated figure for the year 1955. But that does not include the advertising done by the agents.

Q. Have you any idea what percentage of advertising is done by the agents that involves your mark, in addition to your own, compared to your own? A. No, I wouldn't know that figure.

Q. Is it substantial or trivial compared to your own?

A. It is substantial. They all have a display ad in the directory in almost every instance, and we have distributed television reels among the agents for their use at various stations.

Q. Look at this document marked Exhibit 35, and will you tell the court what that shows, please?

A. This shows the annual line haul business starting with the year 1939, with an estimated figure, on through to 1954, with an estimated figure, showing for that year.

Q. What is the 1954 business?

A. Pardon?

(Testimony of Frank L. McKee.)

Q. Your 1954 business estimated at three and a half [51] million gross?

A. Three and a half million, yes.

The Clerk: Plaintiff's 36 and 36-A.

(The drawings referred to were marked Plaintiff's Exhibits 36 and 36-A for identification.)

Mr. Groen: Plaintiff's 36 and 36-A are drawings used as a basis for television reels.

Q. By Mr. Groen: These cardboard displays just marked 36 and 36-A, Mr. McKee, will you explain to the court what they are and how they are used?

A. These are the worksheets for the film that was developed, the cartoon. It starts out with a van approaching, and from which—

The Court: These didn't reach the public, did they?

The Witness: Yes, these already are on TV.

The Court: In this form?

The Witness: In this—well, it is in motion pictures. It is a motion picture film, but we couldn't shoot the film here today. We could have, if it were permitted.

Mr. Groen: We are trying to save time. The motion picture film was taken from this.

The Court: Many litigants do show films here. It awards us kind of a break from the monotony of simply hearing witnesses.

The Witness: We could have one in here by Monday. [52]

(Testimony of Frank L. McKee.)

The Court: Go ahead. I just didn't understand what you were doing.

The Witness: It is a ditty to the tune of Oh, Susanna that goes right on through. This figure jumps up on the top of the van and sings the number.

Q. By Mr. Groen: Well now, the point of this is that it shows your mark National and the stripe design in various places throughout?

A. Yes, all throughout.

Q. These drawings are the basis for your television film, is that right? A. Yes.

Q. What happens to those television films?

A. They are distributed among the agents.

Q. Used throughout the country?

A. Yes, sir.

Q. How many such reels of these films have you in circulation now?

A. I don't know how many in circulation. Our first order has been a hundred.

Q. Have you shown these in television already?

A. At our branch in Dallas there has been one that has been doing now for, oh about a month, I guess.

Q. This is typical material then of your television work? [53] A. Yes, sir.

Mr. Groen: The exhibits just identified by the witness, Exhibits 18 through 36-A, are offered in evidence. And I would like to make the statement that we haven't established any dates and they were not offered to specify any particular dates, either;

(Testimony of Frank L. McKee.)

just a cross section of advertising and other material, except such dates as already appear on them.

The Court: Some of them show dates on their face.

Mr. Groen: Yes.

The Court: They are received.

Mr. Mason: No objection.

(The exhibits heretofore marked Plaintiff's Exhibits 18 to 36-A, inclusive, were received in evidence.)

Mr. Groen: Mr. Mason made the point I hadn't established any dates. I didn't think it was important. Unless they show a date I didn't want to take the witness' time to try to recall.

The Court: Take whatever time is necessary to establish your case. If necessary, we will spend some time on it next week, although I got the impression you didn't want to be here that long and I had planned to start my vacation next week.

Mr. Groen: I had planned to start mine Saturday, also. Mr. Mason has agreed to cooperate. I think we can finish tomorrow. [54]

Then may I ask also whether we may submit photostats of this 36 and 36-A, since Mr. McKee has to return these to the studio.

The Court: Yes.

Mr. Groen: And file those. Is that agreeable, also, Mr. Mason?

Mr. Mason: Yes.

Q. By Mr. Groen: Mr. McKee, have any at-

(Testimony of Frank L. McKee.)

tempts been made at settlement of this proceeding?

Mr. Mason: I object to this as being improper, irrelevant.

The Court: Sustained. Sometimes a desirable route to pursue, but it is not an admissible item of evidence.

Mr. Groen: I just thought of showing—it isn't too relevant—as a possible measure of aggravating any damages that might be forthcoming, if we prevail. For that reason I was going to show what we tried to do by way of settlement.

The Court: I don't think it is legally admissible.

Q. By Mr. Groen: Mr. McKee, you have already incurred certain expenses in connection with the conduct of this trial and you were given an estimate, were you, as to what the total expense would be through the District Court?

A. Yes, sir.

Q. How much is that total estimate? [55]

Mr. Mason: I object to that as immaterial.

The Court: It is not immaterial, but it is premature; at least, it is under the way these cases ordinarily are handled in this District, counsel.

Now, if it is important to you, perhaps we can make an exception here. Usually the question of liability is determined in the main lawsuit, and if attorney fees are awarded, the judges of this District then indicate that attorney fees are awarded and that there shall be a supplemental hearing on a motion calendar on a Monday morning to determine what they will be.

(Testimony of Frank L. McKee.)

Mr. Groen: I only raise the question because I believe that to be the law, except a year or two ago I ran into the same situation in New York, and the Second Circuit Court of Appeals said I missed my chances in not putting in the evidence at the initial trial.

The Court: You don't have to put it in on the main trial.

Mr. Groen: If I can rely on that, I will be perfectly happy to withdraw my question.

The Court: If you have special damages you had better put them in, though, other than attorneys fees. I do not mean an accounting of the profits.

In many of these trade-mark cases if judgment goes for the plaintiff, the defendant is required to hand over the [56] profits that he had made by reason of infringing the trademark. That calls for an accounting. And we just don't undertake to have those accountings until and unless liability is determined.

But if there are damages other than attorney fees, an accounting of profits——

Mr. Groen: If I am not bound by the case of *Admiral vs. Penco*, at 203 Fed. (2d) 515, in the Second Circuit Court of Appeals, which held to the contrary, I would be very happy to hold this in abeyance.

The Court: You are in the Ninth Circuit now, and they have approved the way in which we do it. At least, they have not disapproved it, to my knowledge.

(Testimony of Frank L. McKee.)

Mr. Groen: We will have that understanding, that this may be proved later, if necessary.

The Court: Thank you.

Mr. Groen: That is all of the direct. I have a request of the court and my opponent.

We have three very short witnesses I think we can finish with before 4:00 o'clock, so we wouldn't have to call them back tomorrow.

Could we put them on and hold Mr. McKee's cross examination for tomorrow? I think that would help us a great deal.

The Court: Is that agreeable, Mr. Mason?

Mr. Mason: That is agreeable to the defense.

The Court: All right. Mr. McKee, we will have you step aside and hear the witnesses.

(Witness withdrawn.)

Mr. Fihe: Mr. Minear, will you please take the stand?

RUSSELL C. MINEAR

called as a witness on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated.

State your full name, please.

The Witness: Russell C. Minear.

Direct Examination

By Mr. Fihe:

Q. What is your occupation, Mr. Minear?

A. I am West Coast manager of North American Van Lines.

(Testimony of Russell C. Minear.)

Q. How long have you been associated with that company? A. Seven and a half years.

Q. And your business address?

A. 4760 Valley Boulevard, Los Angeles.

Q. Do you know Mr. Frank McKee, the plaintiff here? A. Yes, I do.

Q. Under what business name does he operate?

A. National Van Lines, Inc.

Q. Are you familiar with the manner in which he displays his service mark in connection with his business? [58] A. Yes.

Q. I show you an enlargement of Plaintiff's Exhibit 15 and will ask you if you recognize that.

A. Yes, I do.

Q. What is it?

A. It is their trade-mark.

Q. Of whom? A. National Van Lines.

Q. When was the first time that you became acquainted with this trade-mark of the National Van Lines? A. Oh, approximately 1937.

Q. In what places have you seen it since?

A. Oh, I first knew of it in Des Moines, Iowa, and I have seen their trucks in places like Omaha, Kansas City, Minneapolis, Chicago; Fort Wayne, Indiana; Los Angeles here.

Q. I now show you an enlargement of plaintiff's Exhibit 4, and ask you to state if you have ever seen anything like that before.

A. Yes.

Q. Where was the first time you remember seeing this particular insignia?

(Testimony of Russell C. Minear.)

A. San Diego, California.

Q. On what? A. On a building.

Q. What was your reaction when you saw that?

A. I thought it was National Van Lines.

Q. You mean Mr. McKee's trade-mark?

A. Yes.

Q. Did you do anything after seeing that?

A. The next time I saw Mr. McKee I mentioned that he had quite a place in San Diego along the highway.

Q. What did he say?

A. He said, "That is not mine. It belongs to my competitor."

Mr. Groen: For the purpose of the record this insignia which the witness has identified is an enlargement of Plaintiff's Exhibit 4.

You may cross-examine.

Cross Examination

By Mr. Mason:

Q. Mr. Minear, what was there about that sign that made you think it was the National Van Lines?

A. The appearance of it, the way it looked, and the name. I saw it as I passed on the highway.

Q. You mean the name National Van Lines? Did you see the name National Van Lines on the sign?

A. No. The appearance of the insignia or the shield is what attracted my attention.

Q. Did you read the name?

A. I couldn't say I read the name, no. [60]

(Testimony of Russell C. Minear.)

Q. And did you observe that that was a map of the United States?

A. I don't recall that I noticed a map on it.

Q. Did you ever see a map on the National Van Lines shield? A. No, I never have.

Mr. Fihe: May I have the reporter read back the previous answer? Not this one, the previous one.

(The record was read.)

Mr. Fihe: Thank you.

Q. By Mr. Mason: Are you familiar with the shield that is used on all the Union Pacific freight cars?

Mr. Fihe: I object. That is improper cross examination. There was nothing said about that.

The Court: What makes it proper, Mr. Mason?

Mr. Mason: I want to show his comparison here, your Honor. It is preliminary.

The Court: All right. On the basis that it is preliminary, you may inquire. Overruled.

The Witness: I know they have a shield, but I don't believe I could describe it.

Q. By Mr. Mason: You spend a great deal of time in Los Angeles? A. Do I?

Q. Yes. [61]

A. Oh, I would say the past summer 75 per cent of my time.

Q. Have you ever observed the vans of the All-American Storage Company here?

Mr. Fihe: I object, your Honor. There again it is improper cross examination.

The Court: I take it that Mr. Mason is leading

(Testimony of Russell C. Minear.)

up to a showing that that shield is in the public domain.

Mr. Fihe: Yes, but let him prove it.

Mr. Mason: I am going to ask this witness the basis for his comparison here. I think these questions are very pertinent.

The Court: Actually, that comment, "let him prove it," is appropriate, because this is not strictly cross examination, except that there are some things which have been almost categorically stated by the witness, and others he is a little uncertain about. And I am not just certain what he did see or what he thinks he saw.

I think Mr. Mason is testing the memory of the witness. You can test a memory a little bit, but please don't try to prove your case through him.

Mr. Mason: I am going to prove that other business, your Honor. I want to test this witness' memory, just what he had in mind when he made that comparison.

I will withdraw that question. [62]

Q. By Mr. Mason: Have you, Mr. Minear, seen other van lines around Los Angeles displaying shields on their vans?

A. I can't say I have ever noticed it.

Q. You can't say that you have or that you haven't?

A. I don't recall of ever seeing a shield on another van line—on another van.

Q. Did you see the word "National" on that sign you saw in San Diego?

(Testimony of Russell C. Minear.)

A. Yes; I would say I did, yes. I wouldn't—I would hate to have to state that definitely. I am familiar with National Van Lines, and I noticed the shield and I considered that was National Van Lines.

The Court: You saw something which you thought was a National Van Lines sign?

The Witness: Yes, that is right.

Q. By Mr. Mason: Mr. Minear, how do you spell your name? A. M-i-n-e-a-r.

Q. Are you related to the Mr. Minear who used to be an associate of Mr. Fihe here?

A. No. I am originally from Iowa. No relation that I know of, of the same name.

Q. How far away from this sign were you when you saw it? [63]

A. I was traveling on Highway 101; first time I had ever been in San Diego.

Q. How far was the sign from your place of observation?

A. I would have to estimate at 150 feet. That is strictly an estimate.

Q. Was it daytime or nighttime?

A. Daytime.

Q. Did you read the full name? A. No.

Q. Well, what sticks out in your mind as having impressed you that that was the National Van Lines? A. The shield.

Q. Just the shield alone?

A. Yes, that is what I took it to be.

(Testimony of Russell C. Minear.)

Q. You paid no attention to the word "National"?

A. I wouldn't say that I did. I am familiar enough with National Van Lines I figured it was their building, their installation.

Q. And if you saw a shield any place, would you think that was the National Van Lines?

A. It would depend on where it was located.

Q. Well, if it was on a truck?

A. Yes, I would assume it was, unless I definitely noticed the name. [64]

Mr. Mason: That is all.

Mr. Fihe: One more question.

Redirect Examination

By Mr. Fihe:

Q. What kind of a truck, if you saw a shield on a certain kind of truck?

A. On a warehouseman van, on a drop frame.

Q. Any other kind of truck? A. No.

Mr. Fihe: That is all.

Recross Examination

By Mr. Mason:

Q. Mr. Minear, did you ever give any business to the National Transfer & Storage Company?

Mr. Fihe: I object to that; improper cross examination, your Honor.

The Court: Overruled.

The Witness: I don't recall of giving them any business, sir.

(Testimony of Russell C. Minear.)

Q. By Mr. Mason: Isn't it true that you attempted to and that they turned you down?

A. I don't recall doing it; really, I don't.

Q. You are familiar with the National Transfer & Storage Company as it used to be, and now the Dean Transfer and Storage Company? [65]

A. Yes. I am familiar with what I have known of them in the past, oh, 20 months, 21 months.

Q. When was it that you saw this sign that you testified about?

A. In December 1952. I was out here on vacation.

Mr. Mason: That is all.

Mr. Fihe: Thank you, Mr. Minear.

(Witness excused.)

Mr. Fihe: Mr. Healey, will you take the stand, please?

GEORGE W. HEALEY

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated.

Your full name, sir?

The Witness: George W. Healey.

Direct Examination

By Mr. Fihe:

Q. What is your business, Mr. Healey?

A. I am in the moving and storage business.

Q. The business address, please?

(Testimony of George W. Healey.)

A. 1836 Arapahoe Street, Los Angeles 36, California.

Q. How long have you been in that business?

A. At this location 11 years.

Q. What is the name of the business?

A. Fidelity Van and Storage Company. [66]

Q. What was your occupation before that time?

A. I was in the long distance moving business.

Q. Operating from where?

A. Chicago and other points, over a period of years.

Q. Do you know Mr. Frank McKee, the plaintiff here? A. Yes, I do.

Q. How long have you known him?

A. At least 16 or 17 years.

Q. Do you know the insignia or service mark that he employs in connection with his business?

A. Yes, I am quite familiar with it.

Q. I show you an enlargement of Plaintiff's Exhibit 15 and ask you to state if you recognize that? A. Yes, I do.

Q. How long have you known of Mr. McKee or his company's use of this insignia or service mark?

A. I think even before I knew Mr. McKee; knew his father.

Q. You knew his father? A. Yes.

Q. Where have you seen this service mark?

A. Oh, in all points. I should say at least forty States in the United States.

Q. Over what period of time?

A. Over a period of 20 years. [67]

(Testimony of George W. Healey.)

Q. And on what items of merchandise or other things? A. On moving van equipment.

Q. I show you an enlargement of Plaintiff's Exhibit 4 and ask you to state, have you ever seen that insignia before? A. Yes, I have.

Q. Do you remember the first time you saw it?

A. Yes, I do; approximately a year ago.

Q. Where? A. At my warehouse.

Q. In? A. Los Angeles.

Q. On what sort of thing was it when you saw it? A. It was on a moving van.

Q. What was your reaction when you saw it?

A. Well, I went to examine it rather closely, because of the similarity between what I knew to be the National Van Lines insignia.

Q. And what did you do, if anything?

A. I did nothing. I just checked it. Thereafter I looked twice when I saw it.

Q. What did you find—

The Court: Did it occur to you to be a National Van Lines sign?

The Witness: I thought it was at first. [68]

The Court: Then you examined it closely, and did you still think so?

The Witness: No, the name Dean Van Lines was on it.

Mr. Fihe: You may cross examine.

Mr. Mason: No cross examination.

Mr. Fihe: Thank you very much, Mr. Healey.

The Court: Thank you, sir.

(Witness excused.)

Mr. Fihe: We have one more witness, your Honor. He might take a little longer, but we can start.

The Court: All right, let's start. I had commenced to think you would really get through by 4:00 o'clock.

WALTER BOCK

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated.

Your full name, sir?

The Witness: Walter Bock.

Direct Examination

By Mr. Fihe:

Q. Your name was mentioned once before here in the testimony, was it not, Mr. Bock?

A. I believe so.

Q. What is your business, Mr. Bock?

A. Regional manager for National Van Lines at Los [69] Angeles.

Q. How long has that been your occupation?

A. As manager for the past four years.

Q. What was your occupation before that?

A. Salesman for National Van Lines, for approximately four years.

Q. What did you do before that?

A. I was in with my folks in the moving business; they had been in it about 70 years.

Q. And where was this? A. In New York.

(Testimony of Walter Bock.)

Q. You are employed by National Van Lines, Inc., Mr. Frank McKee? A. That is right.

Mr. Fihe: May I have the clerk mark a carbon copy of a letter for identification as Plaintiff's Exhibit 37, and a photostat copy of a request for a bid as Plaintiff's Exhibit for identification No. 38?

(The documents referred to were marked Plaintiff's Exhibits 37 and 38 for identification.)

Q. By Mr. Fihe: I show you now the carbon copy of a letter marked for identification as Plaintiff's Exhibit 37, and I will ask you if you recognize that. A. That is right.

Q. Whose signature appears at the bottom of that letter? [70] A. That is mine.

Q. I now show you the photostat copy which is Plaintiff's Exhibit 38, and ask you to state if you recognize that? A. I do.

Q. How about the original of that, when did you receive that, if you can recollect?

A. The stamp here I have, June 18, 1954.

Q. What did you do with that original when you received it?

A. Being it was Government property I mailed it to Fort MacArthur, with a letter advising them that:

"Returned herewith is a crating bid contract addressed to National Transfer & Storage Co., 124 N. Center Street, Los Angeles, Calif.

"As you will note, 124 N. Center Street was our

(Testimony of Walter Bock.)

previous location, prior to the removal of our offices to our present address in 1953.

“No doubt this bid was meant for National Transfer & Storage Co., as National Van Lines, Inc. has never applied for any crating contract.”

Mr. Von Herzen: What is that last?

Mr. Fihe: It is in the letter——

The Witness: “No doubt this bid was meant for [71] National Transfer & Storage Co., as National Van Lines, Inc. has never applied for any crating contract.”

Mr. Fihe: Crating, c-r-a-t-i-n-g.

Mr. Von Herzen: Oh.

Mr. Fihe: I offer the same in evidence as Plaintiff's Exhibits 37 and 38.

The Court: I will look at them. Generally speaking, I don't look at things for identification, because sometimes they don't get in evidence. Sometimes it is necessary to rule upon their admissibility.

Exhibits 37 and 38 will be received in evidence and they will be marked accordingly.

(The documents heretofore marked Plaintiff's Exhibits 37 and 38 were received in evidence.)

Mr. Fihe: Will you stipulate that the photostat copy be used as the original, Mr. Mason?

Mr. Mason: Yes.

Mr. Fihe: Mr. Clerk, will you please mark this document which is a photostat of a check, as Plaintiff's Exhibit 39 for identification?

The Clerk: 39.

(Testimony of Walter Bock.)

(The check referred to was marked Plaintiff's Exhibit 39 for identification.)

Q. By Mr. Fihe: I show you Plaintiff's Exhibit 39 [72] for identification, and will ask you to state if you recognize that. A. I do.

Q. Tell the court the circumstances connected with that document, Mr. Bock.

A. This check of \$25.00, issued by Dean Van Lines, also known as National Transfer & Storage, was made out to National Van Lines, and on the bottom it says, "To apply prepayment on insurance premium at \$5.00."

The check is in the amount of \$25.00. And to be credited to Lieutenant Fred T. Anderson, from San Diego, to St. Petersburg, Florida. Bill of Lading No. 84802.

Q. Where is the original of that check?

A. Now, the original of that check was mailed by the shipper to National Transfer & Storage Co. The Government does not pay for extra insurance when their personnel is moved, and thereby they must pay the insurance premium at the time of pickup.

Now, instead of them mailing \$25.00 to National Van Lines——

Q. Whom do you mean by "them"?

A. The shipper, Lieutenant Anderson.

Q. Yes.

A. They mailed it to National Transfer & Storage and National Transfer & Storage deposited it to their own [73] account, the check, and then made

(Testimony of Walter Bock.)

out this check here to National Van Lines, to pay for the check they had received that originally didn't belong to them.

Q. Who received the original check from National Transfer & Storage?

A. National Transfer & Storage received the original check.

Q. The original check from National Transfer & Storage—

A. They received the original.

Q. I mean the original of that photostat.

A. We did in our L.A. office.

Q. Who opened the envelope? A. I did.

Q. And you recognize that as the photostat?

A. That is right.

Q. Who made the photostat?

A. I had the photostat made.

Mr. Fihe: I offer the same in evidence as Plaintiff's Exhibit 39, the photostat.

The Court: Where did you get that explanation of the transaction?

The Witness: Well, sir,—

The Court: Did you receive a letter in which—

The Witness: No, we didn't receive any letter on it [74] at all. We checked this bill of lading number, and the insurance was issued to the shipper, but the money hadn't been paid. They were supposed to send it in to us.

The Court: The exhibit is received into evidence.

(The check heretofore marked Plaintiff's Exhibit 39 was received in evidence.)

(Testimony of Walter Bock.)

The Court: It has come to the time of day where we will have to take the adjournment. Is 9:15 an agreeable time all around?

Mr. Fihe: Yes.

Mr. Mason: Yes.

Mr. Groen: Delighted.

The Court: All right. We will stand adjourned until 9:15 tomorrow morning.

(Whereupon, at 4:00 o'clock p.m., Thursday, December 16, 1954, an adjournment was taken until Friday, December 17, 1954, at 9:15 o'clock a.m.) [76]

WALTER BOCK

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

By Mr. Fihe:

Q. Mr. Bock, you testified regarding a transaction wherein the defendant in this case had returned to your company the sum of \$25.00, which had been paid to him in error.

In that connection, we presented Plaintiff's Exhibit 39, which is a photostat of the check you testified was the refund check.

Will you look at that again, Mr. Bock, and tell us, please, the date of that check?

A. The date on here is September 30, 1954.

(Testimony of Walter Bock.)

Q. When was this transaction which involved the refund of the \$25.00?

A. That happened in 1953.

Q. So what is your conclusion about this particular check?

A. That I had——

Mr. Mason: I object to the witness stating his conclusion. [77]

The Court: May I have it read?

(The question was read.)

The Court: Sustained.

Q. By Mr. Fihe: And is that, to the best of your knowledge, the actual refund check received at that time?

A. This is not the check, because I noticed the date of '54. And the incident I referred to happened in 1953.

I had called the Chicago office this morning, asking them would they please look for the right check and send it down here, and that is what they are doing now.

Q. What do you mean by "the right check"?

A. The check implied on my testimony yesterday of being sent to National Transfer instead of National Van Lines.

Q. You mean you called Chicago to ask for the original check refunded to you in 1953, or photostat of that check?

A. A photostat of that check.

Q. What did Chicago tell you they would do?

(Testimony of Walter Bock.)

A. They were going to search the records and advise me.

Mr. Fihe: If the court please, if the proper photostat is found may we have permission, and permission of opposing counsel, to substitute the photostat, instead of this one which was perfectly legitimate transaction. We just happened to get the wrong photostat. [78]

Mr. Mason: I am a little confused. I thought this was a photostat of the check.

Mr. Fihe: That is a photostat of a refund which was relating to an entirely different transaction, Mr. Mason, that occurred very recently.

The refund to which the witness was referring yesterday related to the collection by the defendant in error of an insurance premium paid by one of our customers to the defendant. And that was the purpose of the offer of the exhibit yesterday, in order to prove more of this confusion which we are alleging. But we just happened to get the wrong check, I am sorry to say.

The Court: Now you wish to substitute the right one?

Mr. Fihe: If we can, please.

The Court: If you get it, bring it in and we will receive it.

Mr. Fihe: Whether or not we can get it in time from Chicago is the question, your Honor. But if Chicago finds it, they will air-mail it out here.

I may have to come in next week sometime and

(Testimony of Walter Bock.)

make the substitution. I will present it to Mr. Mason first.

Mr. Mason: I won't object to it being a photostat, but I don't know what it is all about so far.

The Court: You don't have a copy of it here?

Mr. Fihe: No, it went to Chicago. [79]

The Court: This is the day of trial, the day we have to receive the evidence. The court isn't going to be here next week. If you want your case to go into the second quarter of 1955, and this is an important bit of evidence, we will consider whether to put it over that far. Otherwise, we will just take such evidence of the transaction that is available and then submit the matter.

I would like to close the case in 1954, if we can.

Mr. Fihe: We understand that, your Honor.

May we have permission then, if the court please, and counsel, to withdraw this particular exhibit, because it is not the right exhibit. And so far as the actual exhibit——

The Court: All right.

Mr. Fihe: ——the proper photostat is concerned, it is not particularly important. The testimony does show that such a transaction occurred, and I am sure that that will suffice.

The Court: The exhibit may be withdrawn.

Mr. Fihe: Maybe I had better take it out now, if the court please.

Will you destroy your copy, Mr. Mason? Just mark it canceled or something.

Mr. Mason: Yes.

(Testimony of Walter Bock.)

Q. By Mr. Fihe: How many trunk lines, telephone lines, go into your place of business, Mr. Bock? [80] A. Seven.

Q. Are incoming calls always correct?

A. Most all the time.

Q. Which ones are referred to you as incorrect?

Mr. Mason: Just a moment. I will object to that on the ground there is no proper foundation that has been laid. There is no testimony here this witness is a telephone operator.

The Court: Sustained on the basis of foundation being inadequate. I don't think he has to be a telephone operator in order to establish a foundation.

Mr. Fihe: Mr. Bock testified he is the manager, and I am just asking him if any calls are referred to him as incorrect calls. I may phrase the question slightly differently.

Q. By Mr. Fihe: Are any calls referred to you which the telephone operator cannot handle?

A. That is right.

Q. What is the nature of those?

A. Well, shippers inquiring regarding their shipments, that we don't have any record of. And they become pretty upset about it and insist on talking to the manager.

The trend of the conversation on most of them was that a National truck picked their furniture up and they are trying to locate it out here. [81]

Mr. Mason: Just a moment. I move that answer be stricken as hearsay.

(Testimony of Walter Bock.)

Q. By Mr. Fihe: Who answers that telephone call for the manager?

The Court: Just a moment, until there is a ruling on the motion.

It is this witness' description of the type of call which he received. It is not offered, as I understand it, for the truth of what was told him, but rather as a description of a telephone conversation which shows confusion, so the motion to strike is denied.

Q. By Mr. Fihe: Will you continue with your answer, please, Mr. Bock?

A. Yes. Some of the shippers that call tell me that all they know is they saw "National" on the van and they had talked to the dispatcher, and they can't get no information. What kind of company are we running?

I try to question them as to where it was picked up, and I go to the dispatcher's office and check the manifest; probably the dispatcher had overlooked it, and I find we have nothing on it.

I finally refer the people to National Transfer, advising them there is such a company. And they ask me for their phone number and I look it up in the phone book, or some of them look it up themselves; and that is the end of the calls. [82]

Q. About how often does that happened?

A. I would say in the past year I have received about eight calls.

Q. Of that nature?

A. That is right, sir.

(Testimony of Walter Bock.)

Mr. Fihe: Will you please mark this booklet as Plaintiff's Exhibit 40?

The Clerk: 40 for identification.

(The document referred to was marked Plaintiff's Exhibit 40 for identification.)

Q. By Mr. Fihe: I show you a booklet, Mr. Bock, marked Plaintiff's Exhibit 40 for identification. Will you please tell the court what that is?

A. This is a picture of a Howard Van Lines truck, with "National Transfer & Storage" and its emblem under the name of "Howard".

Q. How many pictures are in that booklet?

A. There are three pictures.

Q. Who took the pictures? A. I did.

Q. When? A. Sometime in June 1951.

Q. Who is the Howard Van Lines? What is it?

A. Howard Van Lines is a long-line carrier and strictly our competitors. [83]

Q. What do you mean "long-line"?

A. Cross country.

Q. Will you tell the court more specifically what emblem appears on the trucks in those pictures?

Mr. Mason: I think the exhibit speaks for itself, and I object to it on that ground.

The Court: The pictures do speak for themselves.

Mr. Fihe: I offer the booklet containing the three photographs in evidence as Plaintiff's 40.

The Court: Received.

(The document heretofore marked Plaintiff's Exhibit 40 was received in evidence.)

(Testimony of Walter Bock.)

Mr. Fihe: I will ask the clerk to mark this, please, for identification.

The Clerk: 41.

(The document referred to was marked Plaintiff's Exhibit 41 for identification.)

Mr. Fihe: It is an envelope with contents; Plaintiff's Exhibit 41.

Q. By Mr. Fihe: Mr. Bock, I show you Plaintiff's Exhibit 41 for identification, and ask you to state if you recognize that envelope.

A. I do.

Q. Where did you first see that envelope?

A. In our Los Angeles office. [84]

Q. When? A. Yesterday morning.

Q. Who opened that envelope?

A. I did.

Q. Will you now remove the contents and tell the court what you found inside?

A. This envelope came — the outside envelope came from our agent Oakland Moving & Storage Co. at Oakland, California, addressed to "National Van Lines, Inc., 1855 Glendale Boulevard, Los Angeles 26, California."

When I opened the envelope I found an envelope here with a return address on it by Dean Van Lines, addressed to "National Van Lines, 3330 14th Ave., Oakland, California."

Q. May I interrupt, please, Mr. Bock?

Mr. Fihe: I will ask the clerk to kindly mark this Dean Van Lines envelope for identification as Plaintiff's exhibit.

(Testimony of Walter Bock.)

The Clerk: 42.

(The envelope referred to was marked Plaintiff's Exhibit 42 for identification.)

Q. By Mr. Fire: In what condition was the envelope from Dean Van Lines when you received it?

A. Well, as it is now.

Q. Opened?

A. Something else in there—— [85]

Q. Was it opened? A. It was opened.

Q. And what did you do with it?

A. Well, I opened the inside and found another envelope addressed to "National Van Lines, 4250 Horton Street, P.O. Box 184, Oakland, California," and it came from Mollerup Moving & Storage Co. at 133 North First West Street, Salt Lake City, Utah.

Q. How do you spell that?

A. M-o-l-l-e-r-u-p.

Mr. Fihe: Will the clerk kindly mark the Mollerup envelope for identification as Plaintiff's Exhibit 43?

The Clerk: 43.

(The envelope referred to was marked Plaintiff's Exhibit 43 for identification.)

Q. By Mr. Fihe: In what condition was this Mollerup envelope when you got to it?

A. That was open.

Q. Did you find anything inside?

A. Yes, I found a letter and a copy addressed to "National Van Lines, 4250 Horton Street, Oak-

(Testimony of Walter Bock.)

land, California," from the Mollerup Van Lines, interoffice correspondence from Salt Lake City.

This is re a claim of Technical Sergeant Wilmer L. Wilson, GBL-AF 2876360, at George Air Base, Air Force, [86] Biloxi, Mississippi.

Q. What is the date of that letter?

A. December 7, 1954.

Q. Is that the only thing you found inside that Mollerup envelope?

A. No, there was another letter addressed to Dear Sirs, and it was marked to the Claims Department of the Atherton Transfer & Storage Co.

Q. Signed by?

A. Signed by Mollerup Van Lines, Joseph E. Kearsley.

Q. Dated?

A. There is no date on here. And it is addressed to the same claim, Wilmer L. Wilson.

Mr. Fihe: May I ask the clerk, please, to mark the Mollerup Van Lines interoffice correspondence letter for identification as Plaintiff's Exhibit 44, and the carbon copy of the letter signed by Mr. Kearsley of Mollerup Van Lines for identification as Plaintiff's Exhibit 45.

(The documents referred to were marked Plaintiff's Exhibits 44 and 45 for identification.)

Mr. Fihe: I shall now offer the three envelopes with the two letters as the respective plaintiff's exhibits.

The Court: Received.

(Testimony of Walter Bock.)

The Clerk: 41 through 45 in evidence.

(The documents heretofore marked Plaintiff's Exhibits 41 to 45, inclusive, were received in evidence.) [87]

Q. By Mr. Fihe: How often do mistakes like this happen, Mr. Bock?

Mr. Mason: I object to that as no foundation being laid and calling for a comparison and a conclusion.

I don't know what he means by "like this". There is no testimony that anything like that ever occurred before.

The Court: In the present form the objection is sustained. You may ask him how frequently instances of confusion have occurred, but the court will consider the ones which are then particularized.

Mr. Fihe: Thank you, your Honor.

Q. By Mr. Fihe: How often do these instances of confusion occur, Mr. Bock?

A. Are you referring to both phone calls and mail?

Q. Mail now, particularly.

A. Well, that has occurred, I would say, about four or five times a year, to my knowledge.

Q. What do you plan to do about this particular instance, or what can you do about it?

A. This last one here, I checked yesterday morning on the claim and that shipment doesn't even belong to us and it doesn't appear like we even handled it.

(Testimony of Walter Bock.)

Q. It was obviously sent to the defendant here, correct?

A. That is right. [88]

Mr. Mason: That calls for a conclusion; leading.

The Court: Sustained.

Mr. Fihe: You may cross-examine.

Cross Examination

By Mr. Mason:

Q. Mr. Bock, on these telephone calls you referred to, you state that the person calling was confused as to the word "National", is that correct?

A. That is right, sir.

Q. How do you know that he was not confused as to some other trucking company doing business under the name of National, as distinguished from the defendant in this case?

A. Well, during my conversation, when I referred them back to National Transfer I asked the shipper if they didn't get any information through that call, to call me back, and I would check further for them through the I.C.C. And I didn't get any calls back from them.

Q. But you don't know what they eventually found out, do you?

A. No, sir, they didn't call me.

Q. You don't know whether the National Transfer & Storage, the Dean Transfer and Storage referred them to somebody else, do you?

A. I beg your pardon? [89]

Q. You don't know whoever this customer called,

(Testimony of Walter Bock.)

in response to your suggestion, might have told them to call somebody else, do you?

A. That I couldn't say; I don't know.

Q. Haven't you had instances of confusion arising from the fact that other companies in Los Angeles use the name "National"?

Mr. Fihe: That is objected to; improper cross, your Honor.

The Court: Overruled.

The Witness: I haven't had any, to my knowledge.

Q. By Mr. Mason: You are aware, are you not, there are others in Los Angeles in the trucking business using the word "National" as a prefix to their name? A. No, sir,——

Mr. Fihe: Same objection.

The Witness: ——I am not.

Mr. Fihe: I object; improper cross. He is asking about third parties.

The Court: Overruled. But only insofar as this man knows or has observed.

Q. By Mr. Mason: You have never had occasion to look at the telephone book to see what other companies in this business do use the name "National" in Los Angeles?

The Court: Mr. Fihe, we have to get the setting of [90] this case in the commerce of the community. And a mark gains strength with monopoly, and strength diminishes with commonplace characteristics of the mark.

I don't think that if other concerns used "Na-

(Testimony of Walter Bock.)

tional" that that is controlling, but it is one of the factors to be considered.

No one would probably contend here that National Biscuit Company, for instance, or National Lead are infringing upon this plaintiff's mark, or that this plaintiff is infringing upon theirs. They all have valid marks, which is the word "National".

But we should have something of the way in which the word "National" is used in marks, in order that we may get the setting of this particular case and do equity.

We have had enough people testify here and have taken enough evidence that by this time I would naturally have some impression of the case.

Now, I will tell you and Mr. Groen what my tentative thought is about it. It seems to me that the defendant, by the use of his "National Transfer & Storage," has prima facie infringed National Van Lines because of the direct competition. And there has been some evidence of confusion already.

I expect before the day is out we will have more, if the case follows the usual line of these cases.

I don't see at the moment how the use of an outline map [91] of the United States, with the vertical bars, sometimes black and white and sometimes red and white, infringe a background material of a shield with similar bars.

It seems to me that the use of black and white or red and white in up-and-down bars is something which is so common and in the public domain that where the outline material or the borders of the

(Testimony of Walter Bock.)

outline are different, as they are here, that is, one side having a shield, the other party having an outline of the United States, that that in itself is offensive.

But the wording which the defendant uses, according to the present testimony, definitely is an infringement, if the evidence is consistent to the end of the case with the evidence which is presently before us.

Now, that is just tossing out the court's present view. Many times these tentative views, expressed in the course of trial, are changed. But if you don't know what they are, you don't know what to work on.

Mr. Fihe: Thank you, your Honor.

Q. By Mr. Mason: Mr. Bock, isn't it a fact that you know National Nation-Wide Movers are doing business in the moving business in Los Angeles? A. No, sir.

Q. Don't you know that the National Lines is doing business here in Los Angeles? [92]

A. National Lines?

Q. Yes.

A. National Lines put in the phone book—if you want to know the reason, it was to combat the competitors using National Van Lines for their own benefit.

The Court: You can't tell us what the purpose was.

The Witness: I am just giving an opinion on National Lines.

(Testimony of Walter Bock.)

The Court: An opinion is something which witnesses are not allowed to give. The law doesn't allow it.

The Witness: I was the one that put the ad in the phone book, sir.

The Court: You can state what you did. But the inferences that are to be drawn from what you did are something which have to be either argued by counsel or reasoned out by the court.

The Witness: All right, sir.

The Court: I am sorry, but those are the rules of evidence and they are much older than either you or I. And I think we had better stand by them.

Q. By Mr. Mason: You are certainly familiar with the fact that the National Carloading Company does business here?

A. They are a freight line.

Q. They haul furniture, move furniture? [93]

A. No, sir, they are a freight line.

The Court: What do you mean "freight line"?

The Witness: They handle crated merchandise, and we don't.

The Court: Do they use trucks?

The Witness: Yes, sir; freight trucks.

The Court: What do you mean by "crated merchandise"?

The Witness: Well, they have their interstate commerce rights to haul freight, and we have ours just to haul household goods. They are a different company than a van line.

(Testimony of Walter Bock.)

The Court: Do they handle household goods, to your knowledge?

The Witness: If it is to be crated and shipped by train.

The Court: What if it is to be shipped by truck?

The Witness: They do not handle it.

The Court: Is there some characteristic in the way in which you handle household goods which is peculiar to your particular type of business?

The Witness: Well, yes. Our movements of household effects are all blanket wrapped. They are not crated.

The Court: Do you use railroad cars?

The Witness: No, sir, we do not.

The Court: All right.

Q. By Mr. Mason: Is it your statement that your [94] company is the only one that handles blanket-wrapped furniture?

A. No, sir, I never said that.

Q. Aren't you familiar with the fact that National Trailer Convoy operates out of Los Angeles?

A. National Trailer Convoy?

Q. Yes.

A. Will you clarify that, please?

Q. Well, if you are not familiar with it, just say no.

A. Are you referring to trailers, rentals?

Q. Moving business.

A. Moving business? Trailer convoys?

Q. Yes, sir.

A. No, sir, I never heard of it.

(Testimony of Walter Bock.)

Q. Now, referring to this transaction about which you testified and which relates to Exhibits 41, 42, 43, 44, and 45, in what way does the—or is the Dean Van Lines connected with that transaction, if you know.

A. I will try and explain it, why I connect Dean Van. You asked me a question and I want to answer it.

Q. If you know.

A. The envelope that this was addressed to—Mr. Fihe: The exhibit number?

The Witness: 42. The envelope that was addressed with this material in, was addressed from a Dean Van Lines envelope. [95]

Q. By Mr. Mason: Then Exhibit 43 was Mollerup Moving & Storage Company envelope?

A. That is right, sir.

Q. You don't know whether the confusion was with respect to Mollerup Moving & Storage Co., the National Van Lines or the Dean Van Lines, isn't that correct?

A. I do. Mollerup Van Lines is addressed to National Van Lines in Oakland, and the Dean envelope was sent to National Van Lines in Oakland, also.

This Dean Van Lines is an envelope, is from either Dean or an agent of theirs.

The Court: Do you contend, Mr. Fihe, this Dean Van Lines insignia, as it appears upon the Exhibit 42, infringes the plaintiff's mark?

Mr. Fihe: Oh, my, yes, your Honor.

(Testimony of Walter Bock.)

The Court: What is there about that that is infringing?

Mr. Fihe: The vertical stripes are the outstanding part of the mark, and they are exactly copied from the plaintiff's trade-mark.

The Court: Aren't they common throughout commerce?

Mr. Fihe: Not too common, your Honor.

The Court: It just looks like a barber pole or a candy stick of the olden days. But the Dean Van Lines' isn't that distinctive. It certainly is distinguishable from [96] National Van Lines.

Mr. Fihe: When the suit was started, your Honor, the defendant was still using the word "National". That change has been made since the suit was started.

Unless we have a ruling from this court we have no guarantee that he will not go back to that word "National" again.

The Court: I am just trying to get the issue, because I don't recall—I might have been remiss in going over the material introduced at pretrial—but I don't recall seeing anything like 42 until this witness came to the stand.

Mr. Fihe: I don't believe there is anything like that in here. Most of the other material we put in on behalf of the plaintiff did include the word "National" with the red vertical stripes; sometimes in other colors. Of course, in the telephone directories the colors don't show; just the black stripes.

The Court: I notice in a great many of the

(Testimony of Walter Bock.)

exhibits they are black and white stripes, and in others, red, white, and blue.

Mr. Fihe: Yes. Wherever colors are not possible, they are black and white, in some of the brochures, the advertising material that is used.

The predominant feature we rely upon and upon which we believe confusion is taking place, and we so allege, is the [97] combination of those vertical stripes with, in many instances, the word "National" and as they appear in our exhibits, particularly in those telephone directories. A customer of the plaintiff, having recognized the plaintiff's device and its emblem and services, will almost inevitably look for that particular emblem.

I don't want to proceed to argue the case, but that is our contention.

The Court: We want to try to get the issues straight, because I couldn't quite place Dean Van Lines into the issues as originally framed.

Mr. Fihe: Yes. As I explained, that was changed while the suit was pending.

The Court: Then we are going to have a problem here of determining whether an outline of the United States with vertical stripes infringes a shield with vertical stripes.

Mr. Fihe: Quite true, your Honor. You have just boiled it down to exactly that question.

The Court: Well, it boils down to that question. I don't think I did it, particularly.

Mr. Mason: Was there a question pending?

(The record was read.)

(Testimony of Walter Bock.)

Q. By Mr. Mason: As a matter of fact, Mr. Bock, you don't know of your own knowledge whether that was carelessness or confusion, do you?

A. Well, with Mollerup Moving & Storage being in the business, and has our addresses, I just want to point something out here, that Mollerup is evidently doing some work in behalf of National Transfer, but he sent this and addressed it to National Van Lines.

Mr. Fihe: Now you are talking about Exhibit—

The Witness: Exhibit 43.

Mr. Fihe: The Mollerup envelope is Exhibit 43.

The Witness: Yes.

Mr. Fihe: Now, you picked up another one. What is that exhibit number?

The Witness: Mollerup Moving & Storage, addressed to National Van Lines, to P.O. Box 184, Oakland, which is National Transfer's address. We don't have a place of business up there, and there is the confusion.

Q. By Mr. Mason: Now, the transaction to which this relates, which was a claim for an antenna, the claim was submitted by the claimant to the Atherton Transfer & Storage Co., is that right?

A. That is correct, sir.

Q. So that the person who had used the services, he had confused it with the Atherton Transfer & Storage Co.?

A. No, sir. Atherton Transfer & Storage Co. is not our agent.

(Testimony of Walter Bock.)

Q. Well, can you explain why the claimant submitted [99] his claim—

A. There the confusion lies. National Van and National Transfer; I can't account for it.

Q. Is there any connection between the Atherton Transfer & Storage and the defendant in this case?

A. Atherton Transfer & Storage, there is a connection between them and Mollerup. And Mollerup does work for National Transfer, and that is why they sent the letter up to Mollerup.

Q. There is nothing in this letter here—

Mr. Fihe: Exhibit what?

Mr. Mason: Well, all these exhibits, 41 to 45.

Q. By Mr. Mason: Is there anything in either of those exhibits to indicate that the claimant, Sergeant Wilmer L. Wilson, who was the person that used the services, had any thought in mind that he was dealing with the defendant company?

A. I don't know what he had in mind.

Q. Now, I refer you to Exhibit 38, which is a bid apparently for some Government hauling. Do you know who made—or who struck out the line "124 North Center Street" and inserted in pen "1855 Glendale Boulevard"?

A. That is the Post Office Department did that.

Q. And this address, "1855 Glendale Boulevard," whose address is that? [100]

A. That is National Van Lines' present address.

Q. So you don't know whether that was a matter of confusion or just carelessness on the part of the Post Office Department?

(Testimony of Walter Bock.)

A. There is no carelessness. The address is on the top, National Van Lines.

Q. In addressing this to you—

A. Pardon me. This is our previous address, 124 North Center Street. We were there 11 years and then moved to 1855 Glendale Boulevard. We made a post office change of address with the Post Office Department. That is addressed to National Transfer & Storage and not National Van Lines.

Q. You don't know of your own knowledge whether that was merely carelessness or confusion?

A. It is confusion. It was confusing to the Government.

Q. You don't know of your own knowledge whether the Government just didn't take the time to look it up?

A. It is still confusion to the Government if they sent it to some other address on some other name.

Q. It is your claim then the Government could not have been careless?

A. They were confused.

Q. You introduced a photograph that was taken in 1951.

A. Yes, that is right, sir. [101]

Mr. Mason: That is all.

Mr. Fihe: Thank you very much, Mr. Bock.

(Witness excused.)

Mr. Groen: Your Honor, I have one more short witness we would like to put on before we put Mr. McKee back on the stand. Is that all right?

The Court: Surely.

SNOWDEN MORRIS HUNT, JR.

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you please be seated.

Your full name, sir?

The Witness: Snowden Morris Hunt, Jr.

The Court: Sir, this is a large room. You will have to speak out.

The Witness: I will try.

Direct Examination

By Mr. Groen:

Q. Will you please state your occupation?

A. Account executive for Jerry Wade Advertising.

Q. Do you do work for National Van Lines, Inc.?

A. Yes.

Q. I am showing you Exhibits 36 and 36-A, and I will ask you if you are familiar with those.

A. Yes, we prepared that. [102]

Q. Was that the basic material or a film that you produced?

A. Yes, sir.

Q. When was that produced?

A. We started production in July, and it was finished roughly, September 15th.

Q. How many films did you make from that?

A. We made a hundred prints.

Q. What is the purpose of those films?

A. To use on television stations and the major national markets, that is, national cities, marketing areas.

(Testimony of Snowden Morris Hunt, Jr.)

Q. Do you have that film with you?

A. Yes.

Q. How long will it take to show it?

A. A minute film. It runs 57 seconds, technically.

Q. That has been aired over TV?

A. Yes, the first run was about October 15th in Dallas.

The Court: Of what year?

The Witness: Of this year.

Q. By Mr. Groen: It is being placed in the hands of National Van Lines and its agents?

A. Together, I would say about between 15 and 20 agents now have it for use with their areas, and we are placing it in some 43 markets for National Van Lines, Inc.

Q. Dollarwise, how large a product is this?

A. \$100,000.00.

Q. How is this paid?

A. A third by the agent and two-thirds by National Van Lines, Inc.

Mr. Groen: Can we show the film quickly, if the court please. It will just take a minute.

Mr. Fihe: Can you see that from where you are?

The Court: Yes. If I don't see it I will stand up and come down to where I can see it.

Counsel have ordinarily found it more practical to put the screen back a little further.

Mr. Fihe: We need a shorter distance; a peculiar focal length, your Honor.

The Court: I am not going to try to engineer your performance.

(Testimony of Snowden Morris Hunt, Jr.)

Mr. Fihe: As we mentioned, this is to the tune of Oh, Susanna.

(Whereupon, the sound film of Exhibits 36 and 36-A was shown audibly as follows:)

“Toot, toot.

“Call National Van Lines

“For a move that’s safe,

“And free from care. . . .

“You’ll find our service thorough,

“We can move you anywhere! [104]

“National Van Lines

“Call us, we’ll do the rest . . .

“For the finest service,

“Lowest rates, you’ll find we are the best!

“Finest service—you bet!

“Pick up your phone . . . make a call,

“That one call does it all!

“Each move is pre-planned carefully,

“By National—the Pioneer Moving Company.

“Bonded packers pack for you,

“Fragile items,

“Clothing, too!

“Our Super Vans,

“Always hygienically clean,

“Are weatherproof, too,

“And, the safest you’ve seen.

“And, once they’re packed

“And on their way,

“In that one Van

“Your goods will stay!

“Once we’ve arrived,

(Testimony of Snowden Morris Hunt, Jr.)

“To make moving complete,

“We store or unpack, and,

“Make everything neat!

“National Van Lines [105]

“Call us, we’ll do the rest. . . .

“For finest service,

“Lowest rates,

“You’ll find we are the best. . . .

“For the National office nearest you, look,

“In the yellow pages of your telephone book!

“National Can Save You Enough To Pay

“Your Own Driving Expenses To Your New Home!”

Mr. Green: You may cross examine, Mr. Mason.

Cross Examination

By Mr. Mason:

Q. Mr. Hunt, do I understand you prepared that complete in September of this year?

A. Yes.

Q. And just where has that been shown?

A. I know specifically it has been shown in Dallas, because under the Screen Actors Guild regulations we are required to pay talent each quarter, and I know specifically Dallas was the first station that actually ran.

Q. What station was that?

A. I don’t remember it, sir. There are three stations in the Fort Worth-Dallas area. I can call my office and check it, if it is important.

Q. You don’t know of your own knowledge

(Testimony of Snowden Morris Hunt, Jr.)

whether it has been shown any other place, do you? [106]

A. No, we don't have to.

Mr. Mason: That is all.

Mr. Groen: Mr. Hunt, will you withdraw that film?

I would like to offer it in evidence as Plaintiff's Exhibit No. 46.

We will be delayed slightly by having it taken out and handed to the clerk.

The Court: It will be received.

(The film referred to was marked Plaintiff's Exhibit 46 and was received in evidence.)

Mr. Groen: That is all, Mr. Hunt. Thank you.

(Witness excused.)

Mr. Groen: Mr. McKee, will you resume the stand?

You may cross examine, Mr. Mason.

FRANK L. McKEE

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination

By Mr. Mason:

Q. Mr. McKee, you testified, did you not, that you were not with the plaintiff corporation, National Van Lines, Inc., when it was first organized?

A. I was on the West Coast at the time. I went back shortly after the date of its incorporation. I

(Testimony of Frank L. McKee.)

was managing [107] the Los Angeles office in 1931.

Q. For your father? A. Yes, sir.

Q. And it was after the company was incorporated that you went back to Chicago and became connected with the plaintiff corporation?

A. Yes, sir.

Q. Were you still operating for your father in Los Angeles when the plaintiff corporation started business? A. Yes, sir.

Q. Now, you also testified, did you not, that plaintiff corporation acquired your father's business, is that correct? A. Yes, sir.

Q. Do you have any document showing such a transfer from your father to the plaintiff corporation? A. No, sir.

Q. And you were not there at the time the transfer was made? A. No, sir.

Mr. Mason: Your Honor please, I move to strike the witness' testimony that the plaintiff corporation acquired the prior business, on the ground that there is no foundation and purely hearsay so far as he is concerned.

The Court: What about it? [108]

Mr. Groen: The record shows, I believe, that Mr. McKee is president of National Van Lines, Inc., and as an officer he has familiarized himself undoubtedly. I could ask some more questions along that line, about the history of the business.

The Court: Is that an exception to the hearsay rule? I know matters of family and history and pedigree are. I never before heard it suggested that

(Testimony of Frank L. McKee.)

matters of corporate history were exceptions to the hearsay rule.

Mr. Groen: I have had that question come up before, especially in large corporations, where you might have to have 10 or 15 people to testify, to establish one little fact.

A person, executive in charge of records, also in the company and close to it, is qualified to testify about historical events. And I think Mr. McKee has served in that capacity.

And, furthermore, I believe the record shows that even while he was not directly in that office he was also in the moving business at the time, and that he was in communication, that he knows that the material was taken over.

We further have some of these photographs in evidence.

The Court: They are not moving to strike that. At least, they don't have that motion pending.

Mr. Groen: I don't know exactly how broad—

The Court: The motion to strike, as I understand it, is simply as to corporate history prior to the time this witness became associated with the corporation.

Mr. Mason: That is right, your Honor.

Mr. Groen: Could I ask Mr. McKee a question or two at this time about his background?

The Court: Yes.

Mr. Groen: Mr. McKee, when you came with National Van Lines, Inc., were you familiar with the past transactions?

(Testimony of Frank L. McKee.)

The Witness: Yes, sir.

Mr. Groen: Did you familiarize yourself with the past transactions?

The Witness: Yes.

Mr. Groen: Do you know as a fact that National Van Lines, Inc. took over the business and assets of National Shippers and Movers?

The Witness: Yes, sir. I was connected in 1937 and prior to that I had been a salesman, working out of the Chicago office. I was there shortly after the date of incorporation and had seen the records, even produced the corporate papers.

Mr. Groen: Have you had occasion to see records or papers when you first came with National Van Lines, Inc., which would show they took over, succeeded to the business of National Shippers and Movers? [110]

The Witness: Yes, sir.

Mr. Groen: And prior to your time of coming with the National Van Lines, Inc., were you in communication with your father or your father's business?

The Witness: Yes.

Mr. Groen: Did you know what he was doing?

The Witness: Yes, sir.

Mr. Groen: And did you know he subsequently organized the National Van Lines, Inc.?

The Witness: Yes, sir.

Mr. Groen: You know that of your personal knowledge?

The Witness: Yes, sir.

(Testimony of Frank L. McKee.)

Mr. Groen: That is all.

Q. By Mr. Mason: Well, are those documents of transfer in existence?

A. What documents there are would be in the Chicago office.

Q. What documents were they?

A. Well, there were a few pieces of equipment transferred from National Shippers and Movers to National Van Lines at the date of incorporation, and there were some loading equipment and warehouse equipment also transferred at that time.

The Court: What was the date of incorporation?

The Witness: June 1934. [111]

Q. By Mr. Mason: Well, were those bills of sale that you saw—I am trying to find out now—you said you familiarized yourself with it after you went back to Chicago.

I want to know what you saw.

A. I know of the equipment records because that equipment was in existence for years after. And then the—some of our own corporation documents also indicated such change.

Q. What corporation documents, now, are you referring to?

A. I believe the minutes, and there was also—I mean this all came up at the time of our grandfather hearing, application.

Q. Well, do you recall seeing any instrument of assignment or transfer or bill of sale signed by your father, transferring the prior business to the plaintiff National Van Lines, Inc.?

(Testimony of Frank L. McKee.)

A. I don't recall at the moment seeing a bill of sale. I may have seen it, but I don't recall it at the moment.

Mr. Mason: Your Honor, please, this, of course, is an important matter and I renew my motion and also add that this witness' oral testimony is not the best evidence of a transfer, if one actually took place. His testimony does not show any definite transfer.

The Court: Of course, Mr. Mason, you have this witness' testimony concerning the activities of the plaintiff from a [112] date in 1934 on to this date.

So I don't know that it is too critical of what went on before, although plaintiffs in this type of case like to carry their title and good will back as far as they can.

You recall the Smirnoff case. They carried it back, I think, to Russia and France, over a hundred years ago. But it isn't necessary to establish good will, that it existed for so long.

I think your point might not be too important, but as a point of evidence, it is a point of admissibility of the evidence.

Now, I think the motion to strike probably should be granted, but I am not sure.

Mr. Mason: May I say a word?

The Court: The motion to strike, as I understand it, goes only to the corporate history prior to this witness' association with it.

I will take that under submission and do a little reading on it, because it is a question I didn't an-

(Testimony of Frank L. McKee.)

ticipate would arise here, and I have no familiarized myself with that facet of the hearsay rule recently.

Mr. Mason: If your Honor please, I understand you will take it under submission. It will become important later in the case, and I am not challenging the fact that his father might have carried on the business. He has some [113] pictures which indicate he did.

The only thing I am challenging is that the present corporation acquired the previous business in such a manner it can carry anything back to the date of first use by his father. That is my point.

The Court: Well, that is a point we will have to consider. You don't want me to rule offhand here, do you,—

Mr. Mason: No, your Honor.

Mr. Groen: May I make one statement?

The Court: —without having any cases cited to me and not having time to look them up. I don't keep the books up here on the bench.

Mr. Mason: I don't want your Honor to rule on it now.

Mr. Groen: For the record, whether or not there was a formal bill of sale may not be critical at all. The witness testified he doesn't know whether there was or not. I think the record is clear that he knows the physical assets were transferred. We have physical exhibits in evidence showing trucks used by National Shippers and Movers, and then went to National Van Lines.

(Testimony of Frank L. McKee.)

The Court: That isn't part of the motion to strike though, as I understand the motion.

Mr. Groen: Wouldn't that establish the fact—

The Court: You might establish it by many different ways. [114]

Mr. Mason: The fact he might have bought a truck or two doesn't mean he bought the business. I could buy a General Motors truck; that doesn't mean I get with it the General Motors trade-mark.

The Court: Are you contending Mr. Dean acquired the business that existed prior to '34?

Mr. Mason: No, your Honor. The evidence will show that the National Van Lines was a late comer in the field, under that name.

Under the law of trade-marks the first to use it is the owner of it. It goes to ownership of the plaintiff's trade-mark, and it also goes to statements made under oath in the applications for registration of these trade-marks.

Mr. Fihe: May I interrupt? You are not contending, are you, Mr. Mason, the defendant has priority to the plaintiff?

Mr. Mason: No. But before you can pursue, you have to have title yourself.

The Court: Wouldn't the use to which they have testified that they have put this mark between 1934 and the inception of the action give them title as against this defendant?

Mr. Mason: Well, your Honor, they have to have title in order to get a valid registration. He has offered in evidence here and produced three regis-

(Testimony of Frank L. McKee.)

trations, which are [115] prima facie as for everything that is stated in the registration.

Now, what I am doing is I want to know that not only was the National Van Lines not the common law owner of the trade-mark as it necessarily would have to be when it registered the mark, but that it cannot go back to late 1928 or '29, as the witness testified. At best it is my contention that the plaintiff corporation cannot go back any earlier than 1934.

The Court: Does it have to in order to establish its priority to the defendant?

Mr. Mason: Insofar as trade-mark is concerned, your Honor, it wouldn't be necessarily in unfair competition. He is coming into court here with a trade-mark registration saying he is the owner of the trade-mark. He testified he is the owner of the trade-mark. Unless he was the first one to use it in that type of service he is not the owner.

The Court: Well, the motion to strike is submitted.

Q. By Mr. Mason: Now, isn't it true, Mr. McKee, that in forming the plaintiff corporation you and your father carried on another transfer and storage business under the name of National Transfer Company?

A. That was only in recent years.

Q. You did carry on such a business, did you not?

A. Yes, sir. [116]

Q. When did you start it?

(Testimony of Frank L. McKee.)

A. Well, the National Transfer Company was started about three years ago.

Q. When was it terminated, if it was terminated? A. About a year ago.

Q. And that business was independent of the plaintiff, National Van Lines? A. Yes, sir.

Q. Was that business around Chicago?

A. It is a local company, that is right.

The Court: Local to Chicago?

The Witness: Pardon?

The Court: Local to Chicago?

The Witness: Local of Chicago, yes.

Q. By Mr. Mason: Did you do any interstate business? A. No, sir.

Q. Did you travel out of Chicago?

A. Pardon?

Q. Did you do any hauling out of Chicago?

A. No, sir.

Q. Does the National Van Lines do any hauling in Chicago?

A. It has an intrastate certificate, yes, sir.

Q. Does it do any local hauling within the bounds of California? [117] A. Yes, sir.

Q. Much? A. Not much.

Q. About what proportion of its business would be strictly intrastate in California?

A. Intrastate?

Q. Yes. Within the State.

A. I would be afraid to say. I really don't know.

Q. Now, did you, while you and your father were conducting this separate business under the

(Testimony of Frank L. McKee.)

name National Transfer, did you experience any confusion there as between your company the National Van Lines?

A. We established that name as further protection for our own name National Van Lines, so no one else could take the name National Transfer in the State of Illinois.

Q. This business was separate and apart from the plaintiff corporation, was it not?

A. Yes, but we merely wanted to get that name registered so no one else would grab onto it.

Q. You did operate under it, did you not?

A. Yes, sir.

Q. How many trucks did you have?

A. No trucks.

Q. How did you operate?

A. Merely a packing concern. [118]

Q. Did you obtain any license from the plaintiff corporation to use that name, National Transfer, in that business?

A. It was merely incorporated for the protective reasons as given.

Q. You just incorporated, but you did not get any authority from the plaintiff corporation to use it? A. Pardon?

Q. You did not get any authority from the plaintiff corporation to use that name National——

A. The plaintiff corporation is a family corporation, and we can give our consent to another corporation of our making.

(Testimony of Frank L. McKee.)

Q. But as a corporate matter, you did not give that consent? A. I gave my consent.

Q. Did you give it in writing?

A. I gave it verbally.

Q. You gave your own individual consent?

A. Yes, sir.

Q. Now, your father's business, the National Shippers and Movers, that had about two trucks, did it not?

A. To start with, yes, sir.

Q. Did it do any interstate business?

A. Yes, sir. [119]

Q. To what extent?

A. Across the country.

Q. How many trucks did it have when it ceased to do business in 1934?

A. I believe there were three company trucks and a couple of leased units.

Q. Are we talking now about National Van Lines?

A. National Shippers and Movers.

Q. Now, the National Shippers and Movers, that was your father's company. Were you employed in that business? A. Yes, sir.

Q. Now, the name National Van Lines, the first time that was used was when the plaintiff corporation incorporated in 1934, is that correct?

A. Yes, sir.

The Court: You can't show me except through counsel.

The Witness: O.K.

(Testimony of Frank L. McKee.)

The Court: We will take a recess in a little while. If they have overlooked something that should be presented, bring it to their attention.

The Witness: All right.

Q. By Mr. Mason: Now, I call your attention to Plaintiff's Exhibit 4-A, which is a registration 563,950, and the mark there registered is "National Van Lines, Inc.", is it not? [120]

A. Yes, sir.

Q. I call your attention to this statement:

"The service mark was first used by applicant's predecessor in title on or about October 1928."

Now, that statement is not correct, is it?

A. Yes, sir, it is correct.

Q. Didn't you just testify that your father did not use the name National Van Lines?

A. What was your first question?

The Court: Read the question.

(The record was read.)

Mr. Groen: May I call attention to the fact that "Van Lines, Inc." is disclaimed, separate and apart there?

Mr. Mason: You concede, do you not, what you have registered there is a composite mark, "National Van Lines"?

Mr. Groen: Applicant disclaims the exclusive use of the words "Van Lines, Inc."

Mr. Mason: It is not your claim you registered the word "National" by itself?

Mr. Groen: That is the dominant part, yes.

Mr. Mason: I mean, let's not refer to the dom-

(Testimony of Frank L. McKee.)

inant part. You do not claim to register the word "National" by itself, do you?

Mr. Groen: Yes. [121]

Mr. Mason: Do you have a registration showing that?

Mr. Groen: Just this. I interpret it that way.

The Court: What do you mean by "this"?

Mr. Mason: He is referring to Exhibit 4-A, your Honor.

Mr. Groen: 4-A is the registration, your Honor.

To register a name you submit the whole part or the whole thing, the composite, to the Patent Office. If you have descriptive material, like "Van Lines, Inc.", you disclaim that. The registration is for "National", although it is shown as the composite. We very frequently have descriptive material right with the trade-mark, which is disclaimed, and that is what is done here. And that word "National" ties back to National Shippers and Movers.

The Court: You feel that "National" is not descriptive?

Mr. Groen: For this specific business it is descriptive, in a sense, of national work, but we are talking about a specific service of household moving and storage.

The Court: I see. Then you feel "Van Lines" is descriptive of your business, but "National" is not?

Mr. Groen: Well, like many marks today, you will find the dominant part is the mark that the ownership vests in; that is the real mark of identification.

(Testimony of Frank L. McKee.)

The other words used with it may be wholly descriptive, separate and apart. That is what we certainly are not going to try to stop, someone else using "Van Lines" or "Van" or [122] "Inc."

When we take the unit it is dominated by the word "National". Everything is disclaimed for registration purposes by the word "National"; we rely on that. We set that forth in the registration as actually used.

In other words, the Patent Office will not register wholly descriptive words which describe the service or the product. And in this case "National" does not describe what they are doing. "National" is their mark of identification, along with the stripes.

I may say this is a combination here. Stripes and the word "National", and "National" alone in the other.

Mr. Mason: Your Honor will recall counsel's argument in his opening statement, that you cannot dissect a trade-mark. That is what he is trying to do right now.

Mr. Groen: No, the mark is the stripes and the word "National". You can't dissect those. Those are the identifying features.

Mr. Mason: The mark, as I interpret it, is what is shown in this drawing (indicating).

Mr. Groen: Maybe that is a question for argument. The document speaks for itself.

Mr. Mason: Was there any question pending?

The Reporter: No.

Q. By Mr. Mason: The first time that the com-

(Testimony of Frank L. McKee.)

posite [123] mark shown in that registration, which has just been exhibited to you, No. 563,950, was used, was when the plaintiff corporation incorporated in 1934, is that not true? That is, the words "National Van Lines, Inc."?

A. Yes, sir.

Q. Now, I show you Registration 548,018, Exhibit 3-A, and I will ask you if it isn't true the first time that composite mark was used by the plaintiff or anyone else, or your father, was on July 21, 1934.

A. That was the date of incorporation. It could have been used even a little prior to that time, while we were trying to get the name incorporated.

Q. But not prior to 1934.

A. It could have been—the emblem could have been in use prior to the date of incorporation.

Q. You mean the emblem by itself?

A. The emblem and the name, while we were getting it incorporated.

Q. You have no personal knowledge of the fact it was, do you?

A. No. As I said, I wasn't there in '34.

Q. Is it your statement that the plaintiff corporation was the first to use the name "National Van Lines" in the transfer and storage business?

A. To my knowledge, yes, sir. [124]

Q. Now, don't you know, Mr. McKee, the name "National Van Lines" was adopted and used by a transfer company in Milwaukee, owned by a Mr.

(Testimony of Frank L. McKee.)

and Mrs. Mechanic, doing business under the name of National Van Lines?

A. Before National Van Lines?

Q. Yes.

Mr. Groen: Your Honor please, I don't think it is going to be necessary to enter any objections, in view of what your Honor said here about getting the whole setting and the background. I would like to make it clear at this point that alleged third parties' uses have no direct bearing on these cases. There is considerable law to support that. And we have to consider what has gone on between this plaintiff and this defendant.

In view of what your Honor said earlier, I am not going to make any further objection, except if it is clearly understood we can brief that point—

The Court: I understand that it is Mr. Mason's point, in order to valid the registration mark in the Patent Office, it is necessary that the person be the first user of the mark.

If that is so, would it not be admissible for him to show this party Mechanic was a user of the mark prior to the plaintiff or its predecessors?

Mr. Groen: That may have some bearing. But my whole [125] point—

The Court: That would not have any bearing, as I understand it, upon the law of unfair competition.

Mr. Groen: No, it wouldn't. But so far as this registration is concerned, it may have some bearing. My whole point there is there is much talk here by

(Testimony of Frank L. McKee.)

the defendant of third party uses. We maintain that third party uses on unfair competition, even for the trade-mark infringement, are not to be considered between the parties at litigation.

This defendant cannot justify his wrongs by the wrongs of others. There may be many issues, whether these other alleged uses are also infringements, and people that may be sued that are infringing. And that is something we can't go into in this case.

But I just want to make it clear in the record I am going to present the law on that fact, and that I don't want to take up any more time by further objections as to third parties' use.

The Court: All right. We will consider the question of relevancy of evidence of third party uses when the case is finally submitted.

Mr. Groen: Very well.

The Court: And at the present time I think it is entirely irrelevant, so far as the unfair competition phase is concerned, but possibly relevant upon the trade-mark cause [126] of action.

Mr. Groen: Very well, your Honor.

The Court: But that isn't a ruling. That is just a remark. You don't know to what extent I may need to be educated.

We will take our morning recess before we continue.

(Short recess taken.)

Q. By Mr. Mason: Before the recess I believe

(Testimony of Frank L. McKee.)

we were discussing the National Van Lines Milwaukee concern.

You are aware of the existence of that concern, are you not, Mr. McKee? A. Yes.

Q. You are aware of the fact it is doing an interstate business?

A. He operates between Wisconsin and Illinois.

Q. And that he has been doing that for some time? A. Yes, sir.

Q. It is true, is it not, in the current telephone directory in Milwaukee the name "National Van Lines", the Mechanic concern, appears immediately ahead of National Van Lines, Inc.?

A. I don't know what their position is in the directory.

Q. Has it come to your attention that any confusion has resulted because of the two companies doing business [127] under that name at Milwaukee?

A. The name of A. Mechanic in Milwaukee does give a great deal of difficulty to our agents in the City of Milwaukee.

Q. That may be vice versa, may it not?

A. The A. Mechanic company is only a two-state operator, and I don't know what difficulty you might have reference to.

Q. Isn't it true that in 1949 when that company, Mechanic company, incorporated and transferred its assets to the present corporation, National Van Lines, and applied to the Public Service Commis-

(Testimony of Frank L. McKee.)

sion of Wisconsin for a transfer of its license, the National Van Lines filed an opposition to that?

A. I believe we did.

Q. And there was a hearing on it, was there not?

A. I didn't attend it. I don't know how much of a hearing it was.

Q. As a matter of fact, you abandoned your opposition, did you not?

A. I don't remember what the outcome was, sir.

Q. You do know that you did not prevent them from transferring, do you not?

A. If I remember correctly, there was nothing we could do at the time to avoid this situation.

Q. As a matter of fact, didn't they show in that hearing they had entered the field prior to the National Van Lines?

A. I do not recall that. As a matter of fact, Abe or A. Mechanic was an agent for National Van Lines in the early years, the same as defendant in this case.

Q. When was that?

A. I believe it was shortly after '34.

Q. Well, that is when you appointed him as an agent?

A. Yes, sir.

Q. Now, he was already in business under that name National Van Lines at the time you appointed him, was he not?

A. To the best of my recollection, his name was not National Van Lines at the time he first started as an agent. He had the name "National" and I

(Testimony of Frank L. McKee.)

don't know whether it was "Transfer" or some other name in joint use.

Q. Are you sure of that?

A. That is as far as I can recall. I also checked that with my father, and that is to the best of his recollection, also.

Q. Now, isn't it true that the plaintiff National Van Lines, Inc. uses the name "National" in its name to denote that the business is of a national scope?

A. The name "National" does suggest national scope.

Q. And you doing a national business, you use it to [129] show you are doing a national business, do you not?

A. I do not know what Mr. McKee, Sr. had in mind at the time he picked the name National Shippers and Movers. I like the name and that is the reason I am fighting for it.

Q. Do you recall giving your deposition in this case July 22, 1954? A. Yes, sir.

Q. I show you your testimony on page 38 of that deposition, and I will read:

"Q. Do you think the word has some connotation that you are able to go everywhere and deliver goods on a national scale?

"A. Yes; this gives it a far more descriptive name than 'Allied.' That just means a grouping of van lines, but National Van Lines means national in scope."

Did you give that answer to that question?

(Testimony of Frank L. McKee.)

A. Yes, sir.

Q. Now, the shield which the plaintiff uses, you know, do you not, that that is an official seal of the United States?

A. I don't think it is the official seal.

Q. You think it differs materially from the official seal? A. Yes. [130]

Q. Do you think it differs materially from the Olympic, U. S. Olympic team's symbol?

A. Yes, sir.

Q. You don't think they would be confused?

A. The perpendicular stripes might be confusing, if the Olympic shield were used by another mover.

Q. I am asking you, do you consider your shield to be different from the shield which is the official shield of the United States?

A. Do I believe it to be different?

Q. Yes.

A. Well, I know one shield from another. I would say they are different.

Q. You would be able to distinguish them?

A. I personally would, because I designed the National Van Lines shield.

Q. Would you expect the public to distinguish them?

A. I think the public would be confused with any perpendicular stripes, just as Russ Minear, when he saw the stripes on Al Dean's warehouse at San Diego, at a glance he thought it was National Van Lines.

(Testimony of Frank L. McKee.)

Q. Well, it isn't your thought that anyone seeing the vertical stripes on your van would think it was the Olympic symbol?

A. There is a possibility, but I don't know what business [131] would go to the other side.

Q. Well, don't you know that many concerns who have supplied foodstuffs and the like to the Olympic teams have, to advertise that fact, placed the shield on their trucks?

A. I am not worried about foodstuffs.

Mr. Groen: The court please, I have been trying to refrain from objections along this line. I don't think it makes any difference if the shield is identical. We are talking about something we are using in this industry as a mark of identification. Anything beyond this industry has no bearing in this case.

The Court: Are you conceding it has a secondary meaning?

Mr. Groen: For the moving of furniture and storage I certainly do. I think the record will show it.

I can take that emblem off the wall and take it identically and use it as a trade-mark for Mr. McKee's van lines. That has nothing to do with the fact we took it off the wall.

We don't care what is going on in the Olympics or the food line or any other line, except moving and storage.

For that reason I object to any further cross-examination along this line.

(Testimony of Frank L. McKee.)

The Court: I think he is attacking the trade-marks as registered trade-marks, rather than attempting defense to the improper competition feature of your case. [132]

Mr. Groen: But my point, your Honor, is you can register as a trade-mark anything that you might have lifted out of the public domain, as long as you don't keep it with the same material that you lifted it from, or, say, the same business or service.

I can take the stripes in the flag or shield or emblem and use them some place they have never been used before. I can register it as a perfectly good mark.

The Court: You can't use the Flag of the United States as a trade-mark.

Mr. Groen: No, specifically not.

The Court: Or the Seal of the United States.

Mr. Groen: That wasn't done here. My point is I can take any kind of an emblem I might find in use in a display and make a trade-mark out of it in any particular line, if it isn't anticipated for that line. That is why I think the line of testimony is entirely irrelevant and immaterial and far beyond the scope of the direct.

We don't deny there is an Olympic shield. There are other stripes in other things. I will stipulate that that has no bearing on this case.

Mr. Mason: It goes further than that, claiming the barber pole effect on the map of the United

(Testimony of Frank L. McKee.)

States, used by the defendant, is confusingly similar to the shield used by the plaintiff. [133]

The plaintiff stated his shield differs from the official shield of the United States, from the official shield of the United States Olympic team, which I will bring out.

The Court: Is there a pending question?

Mr. Mason: I don't believe there is.

The Court: I don't recall one. It seems to me we had an objection to the line of testimony. Objections have to be placed to specific questions.

Q. By Mr. Mason: Isn't it true that the plaintiff uses this shield to give a patriotic flavor to its business?

A. No, not patriotic. That wasn't the thought in mind.

Q. You do not use it to show that your concern is a United States concern?

The Court: So far as plaintiff's motives are concerned, I don't think they are particularly important. It is the result.

The motive of the defendant might be important as bearing upon damages. But motives of a plaintiff are only important if they bring about a result, if we measure the result, the thing that has happened, rather than the reason why it was done.

I think a firm can even inadvertently, without purposeful design, acquire a trade-mark. Not a registered one, [134] certainly, but one the law will recognize.

Mr. Mason: He can unless he is using it for a

(Testimony of Frank L. McKee.)

descriptive purpose. That was the purpose of my question.

Anyone would be entitled to give a patriotic flavor to their business by using the national colors is the point I was making. I might say it is equivalent to saying it is made in the United States of America.

Q. By Mr. Mason: Now, is it your statement that plaintiff was the first transfer and storage company to use a patriotic shield of that kind on its vans? A. The first company?

Q. Yes.

A. No. The first shield we placed on the truck was placed on a green-painted truck and the shield was an outline in gold. There was no color in the beginning.

Q. Well, it is your statement then the plaintiff was the first concern in the moving and storage business to place on its trucks and stationery a shield shaped like your shield and having alternate vertical red and white stripes?

A. The first to my knowledge to have vertical red and white stripes, in our industry.

Q. Aren't you aware of the fact that the Pihl Transfer and Storage Company in Portland, Oregon, and operating in the Northwest, has used a shield like yours on its trucks for many years?

Mr. Fihe: Maybe we had better spell that name.

Mr. Mason: P-i-h-l.

The Witness: That is something that developed just recently, and it has been brought to my attention they did have such a shield. That here again

(Testimony of Frank L. McKee.)

was a small mover operating between two States, that did have something on that order.

Q. By Mr. Mason: It is true, is it not, that that company used the shield before the plaintiff did?

A. I don't know what is true. I was not present when the deposition was taken and I have not as yet read the deposition.

Q. You do know, do you not, that for many years many concerns have used the word "National" in a transfer and storage business as a prefix to their names?

Mr. Groen: May I ask that question be specified? It is freight or general moving or—

Mr. Mason: I said in moving and storage.

Mr. Groen: Furniture moving and storage?

Mr. Mason: Yes.

The Witness: I don't recall anyone in the moving and storage business that had the name "National" prior to National Van Lines, outside of some local mover you may have disclosed.

Q. By Mr. Mason: And in that answer are you including [136] National Van Lines of Milwaukee?

A. I have already testified to National Van Lines of Milwaukee. He adopted that name after National Van Lines, Inc. of Chicago.

Q. Don't you know that other concerns in the United States in the storage and transfer business are using patriotic shields having vertical red and white stripes on their equipment?

A. Who, for instance? I don't know of anyone.

(Testimony of Frank L. McKee.)

Q. You don't know of anyone. Now, I refer you to Exhibit 18, which is one of the exhibits you placed in evidence yesterday, being the classified section of the current August 1954 Los Angeles telephone directory.

Looking at page 1049, did you observe that the All-American Van & Storage Co. is using a shield?

A. Yes, sir. I don't know when they started using it, and I have action in mind to be taken against that company.

Mr. Mason: I move the latter part of the answer be stricken as not responsive.

The Court: Well, the whole inquiry is probably a field that is not at issue. I will let the whole answer stand.

Q. By Mr. Mason: I call your attention to page 1063, the Atlantic Transfer Company, which uses the Union Pacific shield. Isn't that true? [137]

A. They are also showing the Santa Fe and Southern Pacific emblems along with it. I don't know what their purpose is.

Q. But it does show the Union Pacific shield.

A. They are showing it in the ad.

Q. Have you examined this classified directory?

A. Well, I just went through it quickly. I haven't given it much of an examination.

Q. You don't know what other national companies in the moving and storage business are included in it?

A. I didn't look through that new directory for that purpose.

(Testimony of Frank L. McKee.)

Q. You do find various concerns in that using a map of the United States on its trucks, do you not?

A. The outline of a map, yes; not on the trucks, I don't think.

Q. I believe I asked you if plaintiff did any hauling strictly within the State of California. You testified it was a very small proportion, is that correct?

A. It is a small amount. I don't know what amount.

Q. Now, coming down to this agreement, sales agreement you had with Mr. Dean, that was a standard form of sales agency agreement which the plaintiff uses, was it not?

A. Yes, sir, at that time.

Q. And it was prepared by your company or its attorneys? [138]

A. Well, I prepared it myself. It was not by an attorney.

Q. It was filled out by you or your company and forwarded to Mr. Dean for his signature, was it not?

A. Yes, sir, although I would not be sure one of our Los Angeles men did not take it to him for signature.

Q. He has nothing to do with the phraseology used in that agreement, did he?

A. No, that was my own.

Q. And you signed the contract on behalf of plaintiff?

A. Yes, sir.

Q. Then you knew when you signed that con-

(Testimony of Frank L. McKee.)

tract the name under which he was operating, did you not? A. Yes, sir.

Q. And at that time it was the National Van & Storage Co., was it not?

A. Yes, sir.

Q. Now, you knew, did you not, that apart from the work which Mr. Dean was going to do for the plaintiff, in the booking of interstate shipments, he was going to operate his own business, did you not?

A. Yes, sir.

Q. And you knew that throughout the period of your contract? [139]

A. Yes, sir. I might suggest that Al Dean had a very small business at that time. And we, by consent, agreed that his use of the name was all right.

Q. You did not express any complaint to his use of the name, did you?

A. Not at that time, no, sir.

Q. And you knew he was increasing his business as the years went on, did you not?

A. In later years we recognized that fact.

Q. And you knew, did you not, that within less than a month after signing the contract, that Mr. Dean, of his own volition, changed the name of his company from National Van & Storage to the National Transfer & Storage, so as to eliminate the word "Van", isn't that correct?

A. I knew he changed it, yes, sir.

Q. You didn't request him to do that, did you?

A. No, I didn't.

(Testimony of Frank L. McKee.)

Q. Now, didn't he advise you at that time he had made the change?

A. I don't know what he did at that time; 20 years ago.

Q. Just how did Mr. Dean operate as your sales agent? A. Or ten years ago; ten years ago.

Q. I didn't understand.

A. Ten years ago. [140]

Q. I say, just how did he operate? I want to know just what he did.

A. Well, he was a small transfer concern that was starting up. He had a few pieces of—I don't know how many pieces he had when he started. All I know is that Dad at one time loaned him \$300.00 so he could get his license to come from Beverly Hills into Los Angeles; he was that small. And he was no worry to us, competitively speaking. As a matter of fact, he was our agent and everything was lovely.

Q. You haven't answered my question. I asked what he did as your agent.

A. As our agent he booked shipments in the name of National Van Lines and turned the bookings over to us for service.

Q. He just booked the interstate shipments?

A. He booked interstate shipments and took care of the packing.

Q. And you would supply your trucks to——

A. We would perform the service.

Q. In booking those shipments, you supplied

(Testimony of Frank L. McKee.)

him stationery to fill out, to cover the bill of lading or whatever it was?

A. We would supply orders for service, yes.

Q. He didn't use his own stationery, National Transfer & [141] Storage Co.?

A. I don't know what the storage was. We didn't supply stationery at that time.

Q. What did you supply?

A. Supplied orders for service he could use in the procurement of business for National Van Lines.

Q. While he was booking those interstate shipments you knew he was carrying on his own business apart from that?

A. Whatever it was, yes, sir.

Q. All your sales agents operate that way, do they not?

A. They carry on their own local business, yes, sir.

Q. During the period of his contract with you, isn't it true there were frequent exchanges of correspondence between you and Mr. Dean?

A. Yes, sir.

Q. And he used his own stationery, did he not?

A. Yes.

Q. So you saw the stationery he was using?

A. Yes, sir.

Q. You knew throughout that time that Mr. Dean was building up a valuable business and good will under the name he was using, did you not?

(Testimony of Frank L. McKee.)

A. I knew he was building up for National in San Diego, as our agent. [142]

Q. You knew he was building up his own business, did you not?

A. I knew what he was building up for us.

Q. You didn't know what he was doing—

A. I didn't know what he was doing for himself.

Q. You knew he was carrying on his own business. A. I knew he was carrying on for us.

Q. You testified, I believe, that Mr. Dean canceled the contract. A. Yes.

Q. You testified that he canceled it because he wanted to receive his commissions more promptly, is that right?

A. That is my understanding, yes.

Q. Isn't it true he canceled because of a dispute as to some territorial area up around the Bay Area?

A. Well, I think you are right. That came into it, too. Al Dean wanted everything he could get.

Mr. Mason: I move to strike the last sentence, your Honor.

The Court: Does it make any difference why it was canceled? We have a written instrument here which contains a covenant, does it not, not to use the trade name?

Mr. Mason: It has a specific combination of words you are not supposed to use.

The Court: What is the relevancy of why—

Mr. Mason: Well, your Honor, he had given—

(Testimony of Frank L. McKee.)

The Court: —the original contract was canceled?

Mr. Mason: He had given an answer in his direct testimony, which, according to Mr. Dean, wasn't correct. I want to establish that.

The Court: Now you are moving to strike part of the last answer?

Mr. Mason: Well, he made the statement that he was trying to get all he could get.

The Court: All right. That part will go out.

Q. By Mr. Mason: And up to the time of the cancellation of this contract plaintiff had never complained about Mr. Dean's use of the name "National Transfer & Storage Co."?

A. As long as he was working——

Q. Or about his use of the map?

A. We have ten years of time here that we are talking about. And I don't know what period you are in.

Q. He canceled the contract in 1950, February, isn't that true? A. Yes.

Q. It was signed November 7, 1944.

A. Yes, sir.

Q. During that time the plaintiff did not make any complaint to Mr. Dean about his use of the name "National Transfer & Storage" or the map.

A. According to Mr. Dean's testimony, he didn't have the map during '44 and '50.

Q. Well, did you make any claim to him about the name?

A. As long as the name was working for our benefit we had no complaint.

(Testimony of Frank L. McKee.)

Q. Will you answer the question? Did you or did you not make any complaint to Mr. Dean during the duration of that contract about his use of the name "National Transfer & Storage Co."?

A. I don't believe I did.

Q. In fact, you didn't make any complaint about his use of the name or the map until November 9, 1951, almost two years after the contract was canceled, isn't that correct?

A. Are you talking about written complaint?

Q. Any kind of complaint.

A. I believe I talked to Mr. Dean over the phone on settlement matters and the question came up.

Q. When was this?

A. It would be not too long after cancellation; I don't recall. I am not too clear on that.

Q. You don't know definitely whether anything was said about it or not, is that correct?

A. Yes, I believe I did say something. I have forgotten what the conversation was, truthfully.

Q. Now, you testified, I believe, that by virtue of the contract you licensed Mr. Dean to use the word "National", is that correct?

A. By virtue of the contract we permitted him to use the name "National", that is right.

Q. In soliciting business for you?

A. That is right.

Q. The contract didn't say anything about Mr. Dean's own separate business, did it?

A. I don't think so, no, sir.

Q. It didn't relate to that?

(Testimony of Frank L. McKee.)

A. No, sir, nothing in the contract.

Q. You had no discussions with Mr. Dean prior to the signing of the contract about the contract, did you? I am speaking of you personally.

A. No, I don't think so.

Q. You testified, I believe, yesterday that plaintiff uses the shield on all its stationery.

A. Yes, sir.

Q. I show you Exhibit 37. That is your stationery, is it not?

A. That is a tissue copy, is it not, carbon copy?

Q. This is not your file copy, is it?

A. This is a file copy, yes, sir.

Q. What do you use that copy for, to send it out to [146] people?

A. Carbon copies would go to other offices of ours, or for filing purposes.

Q. You do not use the shield on those?

A. Not on the carbon copies, no, sir. The best of my recollection, that is the only exception.

Q. Didn't you or your company start a company up around Sacramento within the last year, or such a matter, under the name of National Transfer & Storage Co.?

A. Yes, sir. Our company didn't start it.

Q. You say your company did start it?

A. No, our company didn't start it.

Q. Who started it? A. My brother.

Q. Is he a part of the plaintiff corporation?

A. No, sir.

(Testimony of Frank L. McKee.)

Q. Did the plaintiff corporation give him a license to use that name?

A. There is no license.

Q. Did it give him any license to use the name?

A. We didn't object to his use of it.

Q. But that was a separate company from the plaintiff? A. Yes, sir.

Q. Is that still in business?

A. Yes, sir. He is also an agent for National Van [147] Lines.

Q. Now, going back for a moment to your father's business, National Shippers and Movers, isn't it true that he did most of that interstate shipment by rail?

A. No. He did some pool car work along with the van movement. I don't know what percentage.

Q. That was pool care movement, like the National Carloading carries on?

A. No. His pool car work was padded van service, padded in the freight car.

Q. Isn't that what the National Carloading Company does, carry on a pool car shipment?

A. Their pool car business was the loading of freight cars with crated furniture, and Mr. McKee did not use crates.

Q. With the exception of the crates, it was the same type of business, was it not?

A. It was pool car, yes, sir.

Q. And the National Carloading Company used trucks, too, did it not? A. No, sir.

(Testimony of Frank L. McKee.)

Q. Didn't they use them to haul to the freight cars?

A. I don't think they had any vans or trucks hauling to the freight cars. I think all their business was brought to them by small movers and warehouses.

Q. Exhibit 34, you have a list of advertising costs [148] per year. Do you know what is included in that figure, the figures given there?

A. All forms of advertising.

Q. Well, for instance what?

A. Telephone directories, newspaper, radio, television, direct mail costs, anything of that nature.

Q. That includes all the advertising you did?

A. Not all advertising done to promote National Van Lines. As the exhibit states, it does not include the money spent by agents, some two hundred agents.

Q. You don't know what they spent?

A. No, but I would say they spent in the aggregate about as much.

Q. That is purely a guess on your part, isn't it?

A. Yes, but it is a good guess.

The Court: What is the difference between a guess and a good guess?

The Witness: I have looked into my guess as far as I could.

The Court: It means it is an estimate?

The Witness: "Estimate" might be a better word, yes.

Q. By Mr. Mason: Now, you testified, I believe,

(Testimony of Frank L. McKee.)

that you only had the two trade-marks, the registrations of which you have placed in evidence?

A. No, there are three altogether. The white field [149] is also registered.

Q. You do have this white field in which you display your name "National Van Lines"?

A. Yes.

Q. It is registered as a trade-mark?

A. I didn't mean to convey there were only two, if I did.

Q. You are referring to Exhibit 19, you have a list of magazines and newspapers in which you advertised in 1942. Do you have any similar lists prior to that time?

A. No, not here.

Q. In making up this list you did not personally make any detailed comparison of this with your former years? A. No, sir.

Q. Referring to Plaintiff's Exhibit 20, when was that first put out?

A. That particular piece came out in October.

Q. This year? A. Yes, sir.

Q. October of 1954. A. Yes, sir.

Q. I show you Exhibit 21 and will ask you to state when you first placed that advertising matter out.

A. That first came out in October, also.

Q. Of this year? [150] A. Yes.

Q. I show you Plaintiff's Exhibit 22, and I will ask you when you first placed this out.

A. The same time.

(Testimony of Frank L. McKee.)

Q. Same as Exhibit 20?

A. There is a date on there.

Q. Exhibit 22 was put out in July of '54. That is the date appearing. A. Yes.

Q. What about Exhibit 24?

A. That piece, I believe, came out about a month earlier, September.

Q. '54? A. Yes, sir.

Mr. Von Herzen: What exhibit number?

Mr. Mason: 24.

Mr. Von Herzen: Thank you.

Q. By Mr. Mason: What about this, do you know when this exhibit came out?

A. No, I don't know what date that was, but that, I would say, is the early part of this year, I believe.

Q. That is Exhibit 25?

A. Yes, sir.

Q. Now, what about 26?

A. That also came out in October. [151]

Q. Of this year? A. Yes, sir.

Q. Now, what about Exhibit 27?

A. Those cuts have been in existence for the last three or four years.

Q. That is merely a reproduction of a cut you had for the purpose that you used in advertising, is that correct?

A. Yes, sir. That is the style of ad used by agents through our recommendation.

Q. That is Exhibit 27. Now, I show you Exhibit 28, which appears to be a map for the year—I

(Testimony of Frank L. McKee.)

mean a calendar for the year 1955. I assume that was just put out?

A. That is recent, too. That is about, I think that that came out about the same time as the other.

Q. I show you Exhibit——

A. Pardon me a minute. This was November.

The Court: Of this year?

The Witness: No, it would be October. I am right, October.

Q. By Mr. Mason: Exhibit 28 was put out in October of this year? A. Right.

Q. Now, this photograph of Exhibit 29, when was that taken? That shows on here, June 1954; is that correct?

A. No, that is when—— [152]

The Court: This action was filed November 26, 1952. All of these exhibits showing use of name subsequent to that seems to me to be rather beside the point.

Mr. Groen: They are submitted, your Honor, to show how much the trade-mark has been used and is in use, and this was submitted as a current cross section of advertising.

The Court: Do you have a cross section of advertising as it was in existence at the time of filing the lawsuit, or prior to that time?

Mr. Groen: This other pamphlet, which is introduced as Exhibit 27, shows a rather large collection of material of earlier dates, the exact dates. Its caption is, "Advertising Sales Promotion 1953", and

(Testimony of Frank L. McKee.)

I think the witness testified that some of that has been in existence for a considerable period.

Q. By Mr. Mason: Now, referring to the Exhibit 27, the blotter, which is the first item in this folder, when was that first put out?

A. I have forgotten the date, but it would be early in '53.

Q. And when was it circulated?

A. At that time, when we first got it.

Q. To whom did you circulate it?

A. To agents and to the trade.

Q. Now, you have in this same Exhibit 27 a brochure, [153] which at the top says, "A Complete 48-State Long Distance Moving Service." When was that first published?

A. That was a reissue of a former estimate sheet that had been used two years previous.

Q. What were the two years previous?

A. This is '53. That would be '52 and '51, part of '51; I don't know how much.

Q. That was when your representatives went out to solicit their business and they made a proposal on this form?

A. And left that with the shipper, that is right?

The Court: I don't think any of these things which were first used after the controversy started are of any use to us. Those which were used beforehand, of course, are highly relevant material, but I don't think you can establish your right after you have filed your complaint.

Mr. Groen: Except insofar as, I believe, it shows

(Testimony of Frank L. McKee.)

this is typical of the type of advertising carried on constantly. It is always hard to bring in material very old in volume.

This was picked up as current material, and the item, in advertising experience, shows expense over the——

Mr. Mason: That was one of the reasons I was going over this. You asked if this was typical. You didn't say typical of what. I wanted to clear that up.

Q. By Mr. Mason: As I understand your testimony, this was all put out this year or some of it last year? [154]

A. A good deal of it was. This piece here is at least four years old.

Q. You are referring to——

A. "Helpful Hints". This is six or seven years old.

Mr. Groen: Referring to the postcard?

The Witness: Postal card.

Q. By Mr. Mason: You say it was distributed in 1953.

A. This just shows what was done in '53. But that is an old postal card. You can even see the make of the truck as an old truck.

Q. Do you know when you first put that card out?

A. I have forgotten the first purchase, but there have been many reruns of it.

Q. We have a brochure here. When was that first put out?

A. That would be the early part of '51; might

(Testimony of Frank L. McKee.)

have been '50. We had the Cane Advertising Agency in Bloomington. They got that one out.

Q. Are you guessing on it or do you know?

A. No. That is about the time. You are right. I don't know the date.

Mr. Von Herzen: I didn't get the name of the advertising agency.

The Witness: Cane.

Mr. Von Herzen: How do you spell it? [155]

The Witness: C-a-n-e.

Q. By Mr. Mason: This brochure, "Pioneer's Progress", when was that first published?

A. "Pioneer's Progress", well, that would be at least five years old.

Q. This piece of National Van Lines, Inc., it has a note, "20,000 folders distributed in '53."

A. Yes.

Q. To whom were those folders distributed?

A. To agents and to national accounts.

The Court: Let's not inquire into things subsequent to the filing of the lawsuit, except as the inquiry might go to show it is an exemplar of something distributed earlier. I am not interested in anything distributed after the filing of the lawsuit.

Mr. Groen: This has a '52 date on it.

Mr. Mason: It may be the date it was printed. These all bear dates in '53.

The Court: If they were distributed before the suit was commenced, or these examples are of something that was distributed earlier, all right. But I am not going to base any decision here upon

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(Testimony of Frank L. McKee.)

literature which has been flooded in the market after the dispute arose.

We will take our recess until 1:30.

(Whereupon, at 12:10 o'clock p.m., a recess was taken until 1:30 o'clock p.m. of the same day.) [156]

FRANK L. McKEE

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Mr. Mason: I have no further questions.

Mr. Groen: Just a few more questions on redirect.

Redirect Examination

By Mr. Groen:

Q. Mr. McKee, prior to your coming to Chicago with National Van Lines, Inc., that is, prior to 1934, were you employed by National Shippers and Movers? A. Yes, sir.

Q. Where?

A. I was first employed by National Shippers and Movers in Chicago, and then transferred to Los Angeles, and then back to Chicago.

Q. When were you in Los Angeles, what period?

A. Transferred in '31.

Q. You were working for your father from then on for National Shippers and Movers?

A. Yes, sir.

Q. May I refer you again to Plaintiff's Exhibit 8, which shows the truck for National Shippers

(Testimony of Frank L. McKee.)

and Movers. Do [157] you see the stripe design on that? A. Yes, sir.

Q. What was the origin of that stripe design?

A. That design was made up by me.

Q. What year? A. In 1931.

Q. And what about this truck, is this part of the equipment that originally was with National Shippers and Movers?

A. Yes, that truck made regular runs to the West Coast.

Q. And that was prior to 1934?

A. Yes, sir.

Q. Did that truck with the emblem—was that transferred to National Van Lines, Inc., to your knowledge?

Mr. Mason: I object to that as calling for a conclusion and not the best evidence.

Q. By Mr. Groen: Have you any knowledge as to whether that truck was transferred?

A. Yes, I know that truck was transferred.

Q. Is it in service today?

A. Yes, that same truck has been rebuilt and is still in service; that same body.

Q. Where is it located?

A. In Chicago. [158]

Q. With reference to your advertising and particularly the brochure that we paged through on cross examination, that is, Plaintiff's Exhibit 17, you testified as to certain dates of some of this material. A. Yes.

(Testimony of Frank L. McKee.)

Q. Some was very current, after the filing of this suit— A. Yes.

Q. —and some was prior. A. Yes.

Q. Your advertising prior to 1954 and '53 was not as heavy as it is today?

A. That is true.

Q. Is this advertising material in general the type you used the years previous or not?

A. About that type, yes, sir.

Q. But you did not advertise as heavily as you started? A. No, we didn't.

Q. What is the reason for increasing your tempo in advertising?

A. Well, all national lines have increased their amount of advertising, and it is necessary in order to get the business.

Q. Have your other competitors been doing the same thing, to your knowledge? [159]

A. Yes, sir.

Mr. Groen: That is all.

Recross Examination

By Mr. Mason:

Q. Mr. McKee, this Exhibit 8, when did you say this picture was taken?

A. I believe that picture was taken in '32.

Q. How do you know?

A. I believe the license plate on it is '32.

Q. Can you see the license plate on this (indicating)?

A. No; you have to use a magnifying glass.

(Testimony of Frank L. McKee.)

The Court: We have one. Where is it?

Q. By Mr. Mason: Have you ever examined this with a magnifying glass?

A. Yes, I did one time and I believe the date, as I recall it, is '32.

The Court: You now have a glass. Will you point it out to Mr. Mason?

The Witness: It may be difficult to see on this, because it is a photostat, but the original was easier to see. You can't make it out, can you?

Mr. Mason: No, you can't. No further questions.

Redirect Examination

By Mr. Groen:

Q. Do you have the original photograph this is a [160] print from?

A. Somewhere, yes.

Mr. Groen: May we ask leave to file that later as a supplement to this exhibit?

The Court: The evidence ought to be brought here to the trial. We have his testimony when he examined the original in 1932—

The Witness: '32.

The Court: —he observed, but he simply cannot make that out from the photostat which is here today.

Mr. Groen: Yes.

The Court: Unless his testimony that it was a 1932 truck is impeached.

Mr. Groen: That is all, Mr. McKee.

(Witness excused.)

Mr. Groen: At this time I would like to offer as Plaintiff's Exhibit No. 47 this chart, which is really an enlargement of the others we have been referring to, and I think it should stay with the record.

It is a reproduction of Plaintiff's Exhibits 4 and 15.

The Court: All right.

(The chart referred to was marked Plaintiff's Exhibit 47 and was received in evidence.)

Mr. Mason: You are just offering it as illustrative?

Mr. Groen: Yes. Then Mr. White has kindly called my [161] attention to the fact we overlooked offering Exhibits 3-A and 4-A, which are the certified copies of the trade-mark registration, going with Exhibits 3 and 4, and Exhibit 7-C.

Mr. Fihe: The defendant's latest letterhead.

Mr. Groen: The defendant's latest letterhead.

Mr. Fihe: And Exhibit 17.

Mr. Groen: Which is the booklet of advertising we discussed.

I now offer Exhibits 3-A, 4-A, 7-C, and 17.

Mr. Mason: No objection.

The Court: Received.

(The documents heretofore marked Plaintiff's Exhibits 7-C and 17 were received in evidence.)

Mr. Groen: Then, if your Honor please, I offer in evidence the deposition of Marie Martin taken San Francisco, June 12, 1954, as to confusion, and

the deposition of Robert W. Adams, taken June 12, 1954, on the same subject matter;

John G. Morgan, taken in Chicago on the 2nd of September, 1954, and Harold T. Moss, same date, same place;

Joseph S. Ross, same date, same place; Frank L. Ritzmann, same date and same place.

Then I offer the discovery deposition of Alfred Edward Dean, the defendant.

The Court: Before we get to the discovery one, the ones you have offered are received. [162] I haven't heard any objection. I take it there is none.

Mr. Mason: No objection, your Honor.

The Court: All right.

(The documents referred to were marked Plaintiff's Exhibits 48 to 53, inclusive, and were received in evidence.)

[Exhibits 48, 49, 50, 51, 52 are set out at pages 265-403.]

Mr. Groen: May I say this: I had in mind placing Mr. Dean on the stand for a few moments, to summarize some of the material, that is, what we consider kernels among the chaff, which is always true among discoveries.

I understand we are going to brief this material, anyway. I think I can offer this deposition and summarize it in my brief, and we won't have to examine Mr. Dean, except I have one or two questions I can catch on cross examination, as I understand he is taking the stand.

The Court: So you are now offering the deposition?

Mr. Groen: Yes.

The Court: Admitted.

(The document referred to was marked Plaintiff's Exhibit 54 and was received in evidence.)

[Exhibit 54 is set out at pages 403-441.]

Mr. Groen: With that, plaintiff rests.

Mr. Mason: Were there some exhibits attached to this deposition?

Mr. Groen: I assume there are exhibits with several of the depositions.

The Court: Exhibits to a deposition are considered a [163] part of the deposition.

Mr. Groen: That is what I assumed. If there is any question, I am offering the exhibits, also. to this deposition?

* * * * * [164]

Mr. Mason: By stipulation between plaintiff's counsel and the defendant's counsel, it has been agreed, in lieu of placing in evidence, some 624 trade-mark registrations including the word "National", that I can place in evidence a letter from my Washington associate stating the results of his search, and the letter may be accepted for what it states. Is that correct?

Mr. Groen: That is correct, except I reserve my objection, of course, on relevancy and competency. There is no dispute in my mind they can find those registrations and bring them in. I think they are irrelevant to the case.

The Court: It will be received.

The Clerk: It will be Defendant's C in evidence.

(The document referred to was marked Defendant's Exhibit C and was received in evidence. [169])

Mr. Mason: I have here a group of photostatic copies of telephone directories, as follows:

May 1954 of Milwaukee, Wisconsin. I think we might place them in as a group.

September 1954 issue of the Portland, Oregon, telephone directory;

The June 1954 issue of the Chicago telephone directory;

The May 1954 issue of the Philadelphia, Pennsylvania, directory;

September 1954 issue of the Washington, D.C., telephone directory;

The July 1954 issue of the San Francisco telephone directory;

The Seattle phone directory for March 1954;

San Diego directory, telephone directory of January 24, 1954;

And the 1954-55 issue of the Manhattan, New York City, telephone directory.

Those only contain the listing of concerns having the name "National" as a prefix. I offer those, pursuant to stipulation, as a group.

Mr. Groen: Same objections. Otherwise, stipulated.

The Court: Same ruling. I don't know to what extent they are relevant. We will sort it out during the period of submission. [170]

Mr. Groen: I think that is right.

The Clerk: Defendant's D in evidence.

(The documents referred to were marked Defendant's Exhibit D and were received in evidence.)

Mr. Mason: I will offer as the next exhibit the deposition of Mr. Abraham Mechanic, taken in Milwaukee on December 8, 1954.

Mr. Groen: That deposition, of course, is subject to the objections stated at the time the deposition was taken. We again say it is irrelevant.

The Court: Yes. It will be received, but I will consider the objections when reading the deposition.

The Clerk: Is this received as an exhibit, your Honor?

The Court: Yes.

The Clerk: Defendant's E in evidence.

(The document referred to was marked Defendant's Exhibit E and was received in evidence.)

[See pages 442-444.]

Mr. Mason: In conjunction with that, I would like to offer certified copies of some papers from the Interstate Commerce Commission showing the interstate licensing of that company and the proceedings leading up to the granting of the license.

Mr. Groen: No objection, except to relevancy, again.

The Court: Received. And the question of relevancy will be considered in connection with the exhibit. [171]

The Clerk: Defendant's F in evidence.

(The documents referred to were marked Defendant's Exhibit F and were received in evidence.)

Mr. Mason: The next exhibit I would like to offer is papers certified by the Secretary of the Public Service Commission of Wisconsin relating to the hearing on April 27, 1949, relating to the transfer of the license of Abraham and Lillian Mechanic as co-partners in the corporation, doing business as National Van Lines.

Mr. Groen: The objection is relevancy.

The Court: Received.

The Clerk: Defendant's G in evidence.

(The documents referred to were marked Defendant's Exhibit G and were received in evidence.)

Mr. Mason: I have as the next exhibit that I would like to offer a certificate from the Secretary of State of the State of Washington, showing that the National Transfer, Inc., a Washington corporation, was incorporated in that State on April 1, '47, and is still in good standing on the corporate records.

The Court: Received.

(The document referred to was marked Defendant's Exhibit H and was received in evidence.)

Mr. Groen: It isn't necessary for me to make the same objection on relevancy? It will run to all of these? [172]

The Court: Yes. I think there is some doubt as to what the relevancy is. I am going to resolve that after I have an opportunity to read your briefs.

Mr. Groen: My point is I don't have to repeat it, it goes as to all of these?

The Court: That is right.

Mr. Mason: It is agreeable to me you have a standing objection.

Mr. Groen: Fine.

Mr. Mason: The next is a certificate of the Secretary of State of the State of Connecticut, showing that the National Transportation Company was incorporated in that State on October 6, 1920, and is still in good standing on its records.

The Court: Same ruling, same understanding.

(The document referred to was marked Defendant's Exhibit I and was received in evidence.)

The Clerk: Defendant's I in evidence.

Mr. Mason: The next is a certificate of the Secretary of State of the State of New York, showing that the National Moving and Warehouse Corporation was incorporated in that State on June 9, 1941, under the name of National Warehouse & Van Co., Inc., and that according to the records the corporation is still a subsisting corporation.

The Court: Received. [173]

The Clerk: Defendant's J in evidence.

(The document referred to was marked Defendant's Exhibit J and was received in evidence.)

Mr. Mason: The next exhibit is a certificate of the State Secretary of the State of New York,

showing that the National Carloading Corporation was qualified in that State in January 1932, and is still authorized to do business in that State.

The Court: Received.

The Clerk: Defendant's K in evidence.

(The document referred to was marked Defendant's Exhibit K and was received in evidence.)

Mr. Mason: The next is a certificate of the Secretary of State of the State of Oklahoma, showing that the National Trailer Convoy, Inc., is incorporated in that State and is in good standing.

The Court: Received.

The Clerk: Defendant's L in evidence.

(The document referred to was marked Defendant's Exhibit L and was received in evidence.)

Mr. Mason: The next is a certificate of the Secretary of State of the State of New Jersey, showing that National Movers, Inc. was incorporated in that State on March 13, 1948, and is still doing business, qualified to do business.

The Court: Received.

The Clerk: Defendant's Exhibit M in evidence.

(The document referred to was marked Defendant's Exhibit M and was received in evidence.)

Mr. Mason: The next is a certificate of the Secretary of State of the State of Illinois, showing that the National Cartage Co. was incorporated in that State on November 2, 1946, and is still qualified to do business.

The Court: That will be received. Now, there are various degrees of remoteness that are coming

into these, but I will consider all of them, understanding objection to my considering any of them.

Mr. Groen: Very well, your Honor.

The Clerk: Defendant's N in evidence.

(The document referred to was marked Defendant's Exhibit N and was received in evidence.)

Mr. Mason: The next is a certificate of the Secretary of State of the State of New Jersey, showing that the National Freight, Inc. was incorporated in that State in August 1944, and is still an existing corporation.

The Court: Received.

The Clerk: Defendant's O in evidence.

(The document referred to was marked Defendant's Exhibit O and was received in evidence.)

Mr. Mason: The next is a certificate of the Secretary of State of the State of Florida, showing that the National Trucking Company was incorporated in that State on May 30, [175] 1931.

The Court: Received.

The Clerk: Defendant's P in evidence.

(The document referred to was marked Defendant's Exhibit P and was received in evidence.)

Mr. Mason: The next is a certificate of the Secretary of State of the State of Illinois, showing that the National Freight Lines, Inc. was incorporated in that State in February 1938, and is still a subsisting corporation.

The Court: Received.

The Clerk: Defendant's Q in evidence.

(The document referred to was marked Defendant's Exhibit Q was was received in evidence.)

Mr. Mason: Now, the next exhibit will be a volume of some 170 registrations of trade-marks, including the shield with the vertical stripes as a part thereof. These are the soft copies of the registrations.

The Court: Received.

The Clerk: Defendant's R in evidence.

(The documents referred to were marked Defendant's Exhibit R and were received in evidence.)

Mr. Mason: The next I would like to introduce is the deposition of Mr. Pihl.

Mr. Groen: Subject to the objections of record in the deposition, as to relevancy and competency.

The Court: Yes. Some parts of it might be relevant and some parts might not be. We will consider all those when I read your briefs. You can point out particular questions when you brief the case.

Mr. Mason: I would like to offer this together with the exhibits attached to it.

The Court: Received.

The Clerk: Defendant's S in evidence.

(The document referred to was marked Defendant's Exhibit S and was received in evidence.)

Mr. Mason: I will offer as the next exhibit in evidence a certificate of the Secretary of the Inter-

state Commerce Commission as to the licensing of the Pihl Transfer & Storage Co.

The Court: Received.

The Clerk: Defendant's T in evidence.

(The document referred to was marked Defendant's Exhibit T and was received in evidence.)

Mr. Mason: I would like to offer as the next exhibit a photostatic copy of the page following page 728 of the New International Encyclopedia, Volumes 21 and 22, showing the vertical striped flag to which I referred.

The Court: Same objection as to relevancy?

Mr. Groen: Yes. I understand that is a standing objection. [177]

The Court: Yes. It will be received.

The Clerk: Defendant's U in evidence.

(The page referred to was marked Defendant's Exhibit U and was received in evidence.)

The Court: When I said "received," they are all received provisionally.

Mr. Groen: I think he is going to introduce that flag before he gets through (indicating).

Mr. Mason: May it be understood that the original of this shows the stripes in red and white?

Mr. Groen: Yes.

Mr. Mason: And I offer the shield used by the Union Pacific Railroad as the next exhibit.

The Court: Received.

The Clerk: Defendant's V in evidence.

(The shield referred to was marked Defendant's Exhibit V and was received in evidence.)

Mr. Mason: It may be stipulated those stripes are red and white?

Mr. Groen: You mean on yours?

Mr. Mason: On the Union Pacific. This is a photostatic copy.

Mr. Groen: Oh, all right. Yes, indeed.

Mr. Mason: I offer next a photostatic copy of page 1038 of the Los Angeles classified telephone directory, showing [178] the advertisement of the All-American Van & Storage Co. with the shield.

Mr. Fihe: What issue, Mr. Mason?

Mr. Mason: That was at the time of the pretrial hearing. When was the pretrial hearing?

The Clerk: June 15th, I believe.

Mr. Groen: I think it was June '54.

Mr. Von Herzen: I think it was June of '54. And I think the issue—I thought we stated at the time what the issue was, but perhaps not. I think we did, though, your Honor.

The Court: Well, the record of the pretrial will show. You have had that written up, haven't you?

Mr. Groen: No, it wasn't.

The Court: I can't read these stenotype notes.

Mr. Von Herzen: No.

Mr. Mason: We can have that.

Mr. Von Herzen: I am sure we can submit that by stipulation. We have it some place.

Mr. Mason: Could it be stipulated these were in 1954?

Mr. Groen: If you say so.

Mr. Von Herzen: I think it is 1953.

Mr. Groen: Except subsequent to the filing of the suit.

Mr. Mason: If we can. If it is different, anybody can object to it.

The Court: That was my objection. [179]

Mr. Von Herzen: I think the testimony will show, your Honor, that that also was the same in previous issues, and I think we have a witness that will testify to that.

The Clerk: Defendant's W.

(The page referred to was marked Defendant's Exhibit W and was received in evidence.)

Mr. Mason: The next is a photostatic copy of page 579 of the Los Angeles classified directory, about the same time. I think it is the same directory. It shows the advertisement of the All-American Storage Co. with the shield.

The Clerk: Defendant's X.

(The page referred to was marked Defendant's Exhibit X and was received in evidence.)

Mr. Mason: The next is a photostatic copy of page 578 of the Los Angeles telephone classified directory. At the same time showing the advertisement of the All-American Storage Company.

The Court: Received.

The Clerk: Defendant's Y.

(The page referred to was marked Defendant's Exhibit Y and was received in evidence.)

Mr. Mason: Next is a photostatic copy of page 576 of the same classified directory showing the advertisement of the Brugger Transfer & Storage Co. using the shield.

The Clerk: Defendant's Z. [180]

(The page referred to was marked Defendant's Exhibit Z and was received in evidence.)

Mr. Mason: Now, Mr. Fihe, you agree to stipulate as to the seal used on the Helms Bakery trucks in and about Los Angeles?

Mr. Fihe: That is right, subject——

Mr. Mason: Since about the 1930 Olympics.

Mr. Fihe: A little bit later than that, '31.

Mr. Mason: But I have here a photograph, colored photograph of the shield appearing over their plant, and the shield is the same on their trucks.

Mr. Fihe: I should know it quite——

The Court: The importance of the shield emblem seems to diminish considerably since plaintiff has rested, without showing the defendant ever used a shield, unless I have overlooked some part of the testimony.

Mr. Fihe: There is evidence in the record showing that the defendant does use the vertical stripes, your Honor.

The Court: Vertical stripes are certainly not a shield. I gathered, on looking at defendant's mark, that he was using an outline map of the United States with vertical stripes.

Mr. Fihe: It is our position it isn't the outline, it is the vertical stripes that count, with the word "National", that combination. That is what strikes the eye, and that is [181] what people remember.

The Court: That is what the court will have to consider.

The Clerk: Is this received, your Honor?

The Court: Yes, received.

The Clerk: Defendant's AA.

(The photograph referred to was marked Defendant's Exhibit AA and was received in evidence.)

Mr. Fihe: I recognize that; I represent Mr. Helms. I can certainly stipulate to the use of that shield. Of course, with the same objection as to relevancy.

Mr. Mason: The next is a photostatic copy of the page following page 102 in the book entitled "Flags of the World" by H. Crenshaw Carr. I think the original is here in the court, if you want to see it. I showed it to Mr. Groen here. It shows the presidential standard of the shield.

The Court: Received.

The Clerk: Defendant's BB.

(The page referred to was marked Defendant's Exhibit BB and was received in evidence.)

Mr. Mason: The next is a colored photograph of the Los Angeles County flag showing the shield.

The Court: Received.

The Clerk: Defendant's CC.

(The photograph referred to was marked Defendant's Exhibit CC and was received in evidence.) [182]

Mr. Mason: The next is a photograph of the symbol of the Los Angeles Chamber of Commerce using the shield.

The Court: Received.

The Clerk: Defendant's DD.

(The photograph referred to was marked Defendant's Exhibit DD and was received in evidence.)

Mr. Mason: The next is a part of the letterhead of, a Veterans Administration letterhead showing the use of the seal.

The Court: Received.

The Clerk: Defendant's EE.

(The document referred to was marked Defendant's Exhibit EE and was received in evidence.)

Mr. Mason: The next is a symbol of the Los Angeles Bar Association, showing the shield.

The Court: Received.

The Clerk: Defendant's FF.

(The document referred to was marked Defendant's Exhibit FF and was received in evidence.)

Mr. Mason: The next is a symbol of the City of Los Angeles, showing the shield.

The Court: We are not staying close to rele-

vancy there, are we, Mr. Mason? It isn't a question whether any of this is relevant. I rather think much of it isn't. The municipal seals or things of that nature are far removed from the [183] business of either plaintiff or defendant.

Mr. Mason: The purpose in showing that, your Honor, is that there is nothing unique about the shield that the plaintiff uses. It is purely a patriotic shield, is what we claim, because it is commonly used for patriotic purposes. Anybody has a right to use it.

On the other hand,—

The Court: All right. It has been received. I was just talking, not ruling.

The Clerk: Defendant's GG.

(The document referred to was marked Defendant's Exhibit GG and was received in evidence.)

Mr. Mason: The next is a photograph of one of the United Freight Service vans, taken in Los Angeles,—

The Court: Received.

Mr. Mason: —about a week ago.

The Clerk: Defendant's HH.

(The photograph referred to was marked Defendant's Exhibit HH and was received in evidence.)

Mr. Mason: Counsel calls my attention to the fact that the original of this Exhibit BB, the presidential standard shows the stripes in red and white.

Mr. Groen: Accepted.

Mr. Mason: As a matter of fact, your Honor please, the stationery of this court has the official shield as a [184] watermark.

The Court: Vertical stripes?

Mr. Groen: Color?

Mr. Mason: No, not in color. I offer certified copies of the file wrapper of plaintiff's trade-mark Registration 548,018.

The Court: Received.

The Clerk: Defendant's II.

(The document referred to was marked Defendant's Exhibit II and was received in evidence.)

Mr. Mason: Next, a certified copy of the file wrapper and contents of plaintiff's trade-mark Registration No. 563,950.

The Court: Received.

The Clerk: Defendant's JJ.

(The document referred to was marked Defendant's Exhibit JJ and was received in evidence.)

Mr. Mason: I will call Mr. Dean.

ALFRED EDWARD DEAN

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated please.

Your full name, sir?

The Witness: Alfred Edward Dean.

The Court: Before we take Mr. Dean's testimony, the [185] clerk will call our 2:00 calendar.

(Testimony of Alfred Edward Dean.)

(Other court matters.)

The Court: We will return to the case on trial.

Direct Examination

By Mr. Mason:

Q. Mr. Dean, you are the defendant in this case? A. Yes, sir.

Q. When did you start your present business?

A. October of 1944.

Q. Under what name?

A. National Van & Storage Co.

Q. You entered into the sales agency contract with the plaintiff in November 1944, did you not?

A. That is correct.

Q. With what representative of the plaintiff corporation did you deal in entering into that contract? A. With O. J. Plummer, Jr.

Q. Did you have anything to do with the phraseology of the contract? A. No, sir, I did not.

Q. Just what did you do concerning it, as a sales agent for the plaintiff?

A. We held ourselves out for movements of household goods in interstate commerce.

Q. Would you book shipments in interstate commerce [186] for the plaintiff?

A. Yes, we would.

Q. How did you do that booking?

A. Well, we do it through the advertising or holding out of our services to the public or the military.

Q. Now, was any advertising material supplied

(Testimony of Alfred Edward Dean.)

to you by the plaintiff corporation during the time that you were acting as a sale agent under that contract? A. Not to my recollection, no.

Q. Just what was given to you by the plaintiff to enable you to do business?

A. The agreement itself, which recited the terms——

Q. I don't want you to state what was the agreement. Was there anything in the nature of stationery or bills of lading or anything, delivered to you by the plaintiff?

A. No. The only thing that I recall are decals to display on our windows, bearing the name of the plaintiff.

Q. How big was that?

A. Approximately 18 by 12.

Q. What was stated on that?

A. Beg pardon?

Q. What was stated on the decals?

A. The name of the plaintiff, National Van Lines, Inc.

Q. Was there anything stated about your being an agent? [187]

A. I beg your pardon. It did state, "Agents for."

Q. During that time that you were operating as a sales agent for the plaintiff, did you carry on any transfer or storage business of your own?

A. Yes, I did.

Q. Under what name?

A. Under the name of National Van & Storage

(Testimony of Alfred Edward Dean.)

and subsequently under the name of National Transfer & Storage.

Q. When did you change to the National Transfer & Storage?

A. To the best of my recollection, sometime in November, I believe, of 1944.

Q. Now, did you have regular correspondence with the plaintiff while you were acting as its sales agent?

A. Normal correspondence, I would say; yes, there was bound to have been some.

Q. What stationery did you write your letters on? A. On our stationery.

Q. You mean the National Transfer & Storage stationery? A. Yes.

Q. When did you adopt this map of the United States which you display on your trucks?

A. In 1949.

Q. What time in 1949?

A. I don't have the exact month, Mr. Mason.

Q. Now, are you still operating your business under the name "National Transfer & Storage Co."? A. No, sir, I am not.

Q. When did you change?

A. I don't have the date fresh in my mind, but it seems—oh, it must have been six months.

Q. Now, prior to completely eliminating the name "National Transfer & Storage Co.," did you also show your name "Dean Van Lines" on your trucks?

A. Yes.

Q. How did you show that?

(Testimony of Alfred Edward Dean.)

A. Well, just as it appears now, "Dean Van Lines."

Q. Was that when you said, "Also known as National Transfer & Storage Co."?

A. I don't believe that we showed that on our trucks.

Q. Did you show that on your stationery?

A. Yes, and other documents.

Q. Just what did you show on your trucks, now, starting from the time you commenced to change from the use of the "National Transfer & Storage Co."?

A. Well, I showed one or the other. But, to my recollection, never the two. There may be some of the units that were lettered, "Also known as National Transfer & Storage." I am not too clear on it.

Q. Now, is the name "National Transfer & Storage Co." [189] now removed from all your equipment? A. I believe, yes.

Q. You show on that equipment at this time what? A. Dean Van Lines.

Q. Now, you have a picture of your equipment as it is since you changed it, changed the name?

A. Beg pardon?

Q. Do you have a picture of your equipment and premises since you have changed the name?

A. Yes, I do. Mr. Von Herzen has a brochure over there, I believe, that shows it.

Q. I show you a photograph, and ask you if that is it. A. Yes, that is right.

(Testimony of Alfred Edward Dean.)

Q. Now, this large sign here, where is that located? A. San Diego, California.

Q. And that is on your office building, is that right?

A. It is secured right to the warehouse.

Q. And alongside of this—those are a couple of your trucks? A. Yes, sir.

Mr. Mason: I offer this in evidence as Defendant's next exhibit.

The Court: Received.

The Clerk: Defendant's KK in evidence. [190]

(The photograph referred to was marked Defendant's Exhibit KK and was received in evidence.)

Q. By Mr. Mason: What about your telephone listing, Mr. Dean, how do those read at the present time?

A. I believe they are all under the new name of Dean Van Lines.

Q. You have a copy of the page of the Los Angeles classified directory showing your present listing? A. I have seen a copy of it.

Q. Is this it? A. Yes.

Q. This is taken from the August 1954 issue of the Los Angeles classified directory, page 1058.

A. Yes.

Q. Is that correct? A. Correct.

Mr. Mason: I offer this in evidence, your Honor.

The Court: Received.

The Clerk: Defendant's LL in evidence.

(Testimony of Alfred Edward Dean.)

(The page referred to was marked Defendant's Exhibit LL and was received in evidence.)

Q. By Mr. Mason: Now, when you started your business in 1944, how much equipment did you have? A. I had four units.

Q. What do you mean "units"? [191]

A. Four vans.

Q. How much equipment do you now have?

A. I believe 83.

Q. Do you know how much equipment you had in November of 1951? A. No, sir, I don't.

Q. Now, can you tell the court how much business you did in your own business from November 1944 to November 1951?

What is that you have in your hand?

A. This is a report on those figures.

Q. Compiled from your books?

A. Yes. The dates again were what?

Q. November 1944 to November 1951.

A. \$2,440,998.77.

Q. How much does that show for the year 1944?

A. \$8,889.81.

Q. For the year 1945? A. \$161,896.68.

Q. For the year 1946? A. \$282,007.59.

Q. For the year 1947? A. \$157,538.64.

Q. For the year 1948? A. \$140,632.80.

Q. For the year 1949? [192]

A. \$409,534.75.

Q. For the year 1950? A. \$592,231.27.

Q. For the year 1951, up to November 9th?

A. \$688,267.27.

(Testimony of Alfred Edward Dean.)

Q. The total of those figures gives \$2,440,998.77, is that correct? A. Yes.

Q. Now, from February 1950 to the end of 1950, what was your own business? That was the date your contract was terminated, was it not?

A. Yes, sir. I don't think I have the separation on the specific dates. February of '50 to the end of the year was \$555,372.82.

Q. Now, for the year 1951?

A. \$851,278.59.

Q. The year 1952? A. \$1,467,989.80.

Q. The year 1953? A. \$1,627,152.20.

Q. For the year 1954 through May 31st?

A. \$668,454.59.

Mr. Mason: I offer this——

Q. By Mr. Mason: You state this was taken from your records? [193]

A. Yes, sir.

Q. When?

A. Just recently, just received it in the last couple of days.

Mr. Mason: I offer this in evidence as illustrative of the witness' testimony.

The Court: Received.

The Clerk: Defendant's MM.

(The document referred to was marked Defendant's Exhibit MM and was received in evidence.)

Q. By Mr. Mason: Now, where was that business done, Mr. Dean? Was that within the State of California? Was that interstate, or how?

(Testimony of Alfred Edward Dean.)

Take first up to the time you terminated your contract, February 1950.

A. Up to that time it had been done primarily in San Diego, in the Bay Area.

Q. In the State of California?

The Court: San Diego Bay Area?

The Witness: San Francisco Bay Area.

Q. By Mr. Mason: Now, do those figures include any of your commissions you received from the National Van Lines on interstate business you booked for them? A. Yes, they do.

Q. About percentage of the total would that be?

A. Less than four per cent.

Q. Now, commencing February 1950, after you terminated the contract with the National Van Lines, and down to date, where has your business been conducted, that is, where have your shipments gone to and from? A. From California.

Q. All within the State?

A. All within the State, yes.

Q. Do you do any interstate shipments?

A. I service interstate shipments through inter-line.

Q. Explain how you do that.

A. I hold hands, as it were, with another carrier to render service in States that I do not have authority in.

Q. You turn the freight over to the other carrier, is that it? A. Yes, sir.

Q. Your trucks do not go out of the State of California? A. No.

(Testimony of Alfred Edward Dean.)

Q. Now, when was the first time that you ever received any complaint from the plaintiff corporation about your use of the name "National Transfer & Storage Co."?

A. I believe it was in 1952.

Q. To refresh your memory, was it the time you received a letter from their attorney?

A. Yes, sir. [195]

Mr. Mason: May it be stipulated that was November 9, 1951?

Mr. Groen: If that is what the record shows, yes.

Mr. Mason: That would be November 9, 1951.

Q. By Mr. Mason: Now, you had not up to that time received any complaint from the plaintiff about your use of the name? A. No, sir.

Q. You heard Mr. McKee testify in court this morning that he might have discussed it with you over the phone shortly after the cancellation of the contract. Do you recall any such conversation?

A. Not about that, no, sir.

Q. Mr. Dean, you heard Mr. Minear testify yesterday, who I believe testified he had been employed by the North American Transfer & Storage Co. for about seven years. A. Yes, sir.

Q. You heard him testify about observing your sign in San Diego? A. I did.

Q. Would that have been the sign that is shown on this photograph which we just placed into evidence? A. No, sir.

Q. Not this sign?

(Testimony of Alfred Edward Dean.)

A. I don't believe he had reference to that sign, no. [196]

Q. Did you have another sign there?

A. We had the "National Transfer & Storage" sign on a previous building, a building that we were forced out of here within the last year.

The Court: Is the sign still there?

The Witness: This is the sign, only it has been modified to reflect Dean Van Lines, in lieu of National Transfer & Storage.

Q. By Mr. Mason: Now, have you within the past seven years had any business connection with the North American Van Lines?

A. Yes, I was there agent.

Q. When?

A. Immediately after my termination with Mr. McKee.

Q. Now, do you have any familiarity with the various other transfer and storage companies operating in the United States?

A. I am sorry. I didn't get the question.

Q. I say, do you have any familiarity with the other transfer and storage companies operating in the United States?

A. Yes, sir, I do.

Q. Do you know of any other than the plaintiff, National Van Lines, using the word "National" as a prefix in the name? [197]

A. Yes, sir, I do.

Q. Can you name some of them?

A. We have National Transfer of Seattle, Wash-

(Testimony of Alfred Edward Dean.)

ington; National Movers, National Moving & Warehouse, National Van Lines.

Q. Are you referring to the plaintiff?

A. No, I am referring to the firm in Wisconsin. National Carloading, National City Transfer & Storage.

Q. Where is that?

A. That is in National City.

Q. California?

A. California; suburb of San Diego. I can't recall the rest of them.

Q. Do any of those, to your knowledge, operate country-wide?

A. Some of them had quite extensive authority, yes, sir.

Q. Which ones?

A. National Movers, I believe, have quite a broad certificate, and I believe it is National Moving & Warehouse that is a New York firm that have quite a broad certificate.

I don't know the extent of the permit of the firm in Seattle, but I understand they have a coastal operation.

Q. Is that all you can think of?

A. At the moment, yes, sir. [198]

Q. Do you know of any other transfer and storage companies which use a shield like the plaintiff's shield on their trucks? A. Yes, I do.

Q. Name those.

A. A company by the name of Brugger Van & Storage Co. All-American Van & Storage.

(Testimony of Alfred Edward Dean.)

Q. Los Angeles?

A. They are local firms, yes.

Pan-American Van & Storage.

Those are the immediate companies I can think of.

Q. Now, you refer to the All-American, Brugger, Pan-American Storage as using shields.

I now exhibit Exhibits Z, W, X, and Y, and ask if those are the companies, or if those show advertisements of the companies which you have mentioned.

A. Yes, sir.

Q. Do you know how long those companies have been using those shields?

A. I believe the Brugger Company dates back to 1936 or '37.

Q. Have you seen it that long?

A. Yes, sir.

Q. How about the other companies?

A. I first noticed the All-American shield when they [199] came into prominence in our field. They have been pretty progressive locally, a local company. I believe it was around 1939 or '40 that I first noticed it.

Q. Mr. Dean, what has been your experience as to the importance of the name of a transfer company in obtaining business of moving household furniture.

A. I don't know that I quite follow. What has been my experience what, sir?

Q. As to relative importance of the particular name of the concern, the moving company. Is that

(Testimony of Alfred Edward Dean.)

of importance to the customers, so far as your experience goes?

A. Well, yes and no. Some of the firms that have put themselves in national prominence might have a little less difficulty than we have enjoyed in developing traffic.

Unfortunately, we have enjoyed a little more difficulty in procuring business because the companies we represented, including ours, were somewhat of an unknown, and therefore found it a little more difficult to book traffic in great volume.

Q. Well,—

A. Perhaps to add to that, to my yes statement, I think you will find that firms are leaders in the field, such as the Mayflower Company, for instance, and I believe they gain an awful lot of traffic through the fact their name has become significant and they have become a subconscious [200] thought with the shipping public, where such has not been the case with our service.

Q. Do you know of any moving and transfer companies using the map of the United States on their vans, other than yours? A. Yes, I do.

Mr. Groen: Objected to as irrelevant.

The Court: I think that we have had enough evidence to establish the point which has been asked. I hope you won't labor it. I think it is perhaps relevant.

Mr. Mason: I will withdraw the question then. I don't want to unduly take up the court's time.

Mr. Von Herzen: There is some question about

(Testimony of Alfred Edward Dean.)

the date of the book of the classified directory that was introduced.

Mr. Von Herzen: I have located the date. The pages 576, 578, and 579, which are here in evidence as exhibits.

Mr. Fihe: Exhibits X, Y, and Z.

Mr. Von Herzen: X, Y, and Z I have here.

Mr. Fihe: That is right.

Mr. Von Herzen: They are from the 1943 classified directory. 1943; 11 years ago.

The Court: Thank you.

Mr. Von Herzen: It may be so stipulated?

Mr. Groen: If that is what you say, yes. [201]

Q. By Mr. Mason: Am I correct in understanding, from your testimony, at this time you are not carrying the name "National Transfer & Storage Co." in any telephone directory.

A. To the best of my knowledge, that is correct.

Q. Have you given instructions to the telephone companies to remove any reference to "National Van & Storage Co."? A. We have, yes.

Q. When did you do that?

A. I don't recall when the bulletin was issued. I think that has been out possibly nine months.

The Court: Have you used the "National" name in any other way during the past nine months?

The Witness: No, sir. I endeavored to get them out of the issues made by the telephone company.

Q. By Mr. Mason: I didn't hear you.

A. I say we have the instructions out to substi-

(Testimony of Alfred Edward Dean.)

tute as time will permit, with the various directories, in any of the areas where we operate.

Q. I have handed you a document here. What is this?

A. This is my trade-mark listing record. This is my order for trade-mark service.

Q. What do you mean by that?

A. Well, this type of service is furnished companies enjoying the trade-mark that they wish to publicize in any [202] given area. All we have to do is notify the telephone company and that will appear in a given area as you see there (indicating).

Q. In all of these instances you have given your name as Dean Van Lines?

A. Yes, sir. I might add——

Q. This is dated June 1954, is that correct?

A. Yes.

Q. You gave the instructions to the telephone company at that time?

A. Yes; Interstate Commerce Commission, Public Utilities. We have given them notice of our desire to abandon the title of National Transfer & Storage. That is all a matter of record.

Mr. Fihe: I didn't hear that. May I have the answer read? His voice was rather low.

(The answer was read.)

The Witness: Mr. Fihe, I think Mr. McKee would get a copy of the publication.

Mr. Mason: I offer this in evidence as defendant's next exhibit.

(Testimony of Alfred Edward Dean.)

The Court: Received.

The Clerk: Defendant's NN in evidence.

(The document referred to was marked Defendant's Exhibit NN and was received in evidence.) [203]

Q. By Mr. Mason: Have you made any change of your name to the Dean Van Lines to the Interstate Commerce Commission? A. Yes, sir.

Q. When was that, do you know?

A. Just recently, within the last four months.

Q. So your certificate from the Interstate Commerce Commission now only reads "Dean Van Lines"? A. Yes.

Q. It is true that prior to that it read "Dean Van Lines and/or National Transfer & Storage Co."? A. That is correct, yes, sir.

Mr. Mason: I think that is about all. You may cross-examine.

Cross Examination

By Mr. Groen:

Q. You remember when we took your discovery deposition? A. Yes, sir.

Q. June 14th. A. I do.

Q. You recall that you said then you were going to use both, referring to both names, Dean Van Lines and National Transfer & Storage?

A. Yes, sir. [204]

Q. You say you issued a bulletin nine months ago saying you were going to discontinue National?

A. I said about that time; I wasn't sure of the date, Mr. Groen.

(Testimony of Alfred Edward Dean.)

Q. There is no dispute about the fact you testified you were going to use both and you said that in June?

A. Yes, sir, I believe that is correct.

Q. All right. Now, you say that you had the name "National Van & Storage" or "National Transfer & Storage" before you took the agency agreement with plaintiff? A. Yes.

Q. Now, actually, you didn't have that name more than about ten days, isn't that right?

A. About that, yes, sir.

Q. And you started in business, say, about ten days prior to the signing of this agreement with National Van, the plaintiff?

A. That is drawing it pretty thin somewhere.

Q. I think it is a matter of record.

A. Yes; it wasn't long.

Q. You had, of course, been negotiating with National Van Lines, the plaintiff, prior to the actual signing of the agreement. All that was done at one time, in contemplation of your arrangement with them, wasn't it?

A. Pretty much, sir, yes. [205]

Q. Now, you said that you adopted the map which you used with your name in 1949. Did that map include the vertical stripes at that time?

A. Yes, it did.

Q. Do you recall that you testified in your discovery depositions that you adopted the insignia or stripe design in 1950 or '51?

(Testimony of Alfred Edward Dean.)

Mr. Mason: I think you can show him his testimony.

Mr. Groen: I will show it to him.

The Witness: I developed the true information in the meantime on that, Mr. Groen, and it happened to be, I believe, November of '49.

I say that because we had an order placed for letterheads bearing that insignia.

Q. By Mr. Groen: It was late in '49, wasn't it? A. Yes.

Q. You canceled your contract with plaintiff early in 1950, didn't you, February 1950? That is in the record.

A. Yes, I guess that is right.

Q. There had been some difficulty for several weeks or months prior to the cancellation of the agreement, hadn't there?

A. That is the reason I hesitated, the way you put the question. Yes.

Q. Is that your complete answer? [206]

A. Will you repeat the question, please?

Q. Well, there had been some difficulty between you and plaintiff about the agency relationship prior to the actual cancellation?

A. Well, there had been a little misunderstanding, that is right. It grew in proportion and found sufficient cause to terminate it.

Q. That went on for several weeks or several months before you actually terminated?

A. No, it went on for less than a week.

(Testimony of Alfred Edward Dean.)

Q. You mean to say that trouble arose within a week and you canceled?

A. No. The misunderstanding took place on one date and within a week of that time we terminated.

Q. Did you have another agent at the time that you actually canceled on February 20, 1950, with plaintiff? A. Did I have an agent?

Q. Or did you have another principal that you worked with on a national basis at that time?

A. No, I did not, sir.

Q. I have before me your letter of cancellation dated February 20, 1950.

Mr. Groen: I will ask that be marked as Plaintiff's Exhibit No.—

Mr. Fihe: Pardon the interruption. Do we want to mark [207] our depositions with exhibit numbers?

Mr. Groen: Is that necessary, your Honor?

The Court: How do you wish to mark them?

Mr. Fihe: With the corresponding exhibit numbers; don't you think that would more properly identify them?

Mr. Groen: I gave the names.

The Court: I think it should have a number so that in searching back through the record we will not have to search—

Mr. Fihe: May we digress a moment then to get those numbers on them. Then the defendant's deposition, Mr. Dean's deposition, will be 54.

Mr. Groen: This will be—

Mr. Fihe: 55.

(Testimony of Alfred Edward Dean.)

The Clerk: 55.

(The document referred to was marked Plaintiff's Exhibit 55 for identification.)

Mr. Groen: You are familiar with this?

Mr. Mason: Yes.

Q. By Mr. Groen: Now, returning to my question, Mr. Dean, this document just marked No. 55, isn't that your letter of cancellation of the agreement with plaintiff National Van Lines, Inc.?

A. Yes, sir.

Q. Doesn't that show right on the face of it you are [208] agents for Republic Van Lines?

A. Yes.

Q. Hasn't that been stamped over to remove the place that you are agent for plaintiff?

A. I had to have an immediate connection after termination, to cover my shipments.

Q. I thought you just testified you didn't have an agency.

A. You said prior to termination.

Q. Well, all right. This letter was written——

A. I don't think you will find any traffic. I think it might have been done.

Q. In other words, you had your agreement with Republic before you canceled with National?

A. No, we did not. The agreement date with Republic would not be prior to this one.

Q. Then you mean to say you just put that on February 20, 1950, when you wrote plaintiff canceling the contract and you just slapped on there "Agent for Republic"?

(Testimony of Alfred Edward Dean.)

A. Yes, that is a change that took place in a hurry.

Q. You never talked to Republic, whether you could represent them?

A. Not prior to our difference with Mr. McKee.

Q. Not prior to the time you put their name on there and stamped out plaintiff's name? [209]

A. That is very possible.

Q. You just put that there and hadn't talked to them?

A. No; it probably wouldn't make sense.

Q. You had an agreement with Republic prior to that date or you didn't. You show it on your letterhead as of that date.

A. This actually was in support of a cancellation that had taken place sometime prior to the letter, Mr. Groen, and that was through. I believe I have the teletype communication that terminated our working officially.

This was merely confirmation petition to Mr. McKee, to make an accounting of the moneys due us. So this letter actually was not the official termination. The termination had been in effect some time before the letter was written.

Q. I thought we just got through testifying that the termination was under discussion a very brief time a week prior.

A. I can hardly develop the teletype message Mr. McKee and I had; he will recall that.

Q. When would you have put "Agent for Republic Vans" on this letterhead?

(Testimony of Alfred Edward Dean.)

A. When I became their agent.

Q. When was that?

A. At the time I wrote this letter to Mr. McKee I was an agent for Republic. This had been done in the interim [210] and that is how I happened to have that letterhead.

The termination of our working agreement with Mr. McKee actually took place possibly a couple of weeks before this letter was written.

Q. At that time you had an agreement already——

A. No, I did not. That is why I say, it is unlawful for me to have an agreement with another carrier that parallels the authority Mr. McKee had to service.

Q. When would you place your agreement with Republic?

A. Between the time that we terminated and the time that was written (indicating).

Q. How much time elapsed on that?

A. I would have to guess on that, Mr. Groen. I would say a couple of weeks.

Q. Then your discussion as to termination with plaintiff was more than a week, you testified to, earlier then? A. That is possible.

Mr. Groen: It is offered as Exhibit 55.

The Court: Received.

(The document heretofore marked Plaintiff's Exhibit 55 was received in evidence.)

Q. By Mr. Groen: Is it true, Mr. Dean, that you stamped the name "Agent for Republic Van Lines" right over the same line where you had pre-

(Testimony of Alfred Edward Dean.)

viously had "Agent for National Van Lines, Inc."?

A. Yes, I think we used the same stationery.

Mr. Groen: Please mark this for identification.

The Clerk: Plaintiff's 56 for identification.

(The document referred to was marked Plaintiff's Exhibit 56 for identification.)

Q. By Mr. Groen: Now, Mr. Dean, I am showing you another letter you wrote to Mr. McKee, dated January 31, 1950, marked Exhibit 56 for identification. Are you familiar with that?

A. Yes.

Q. You wrote that letter, didn't you?

A. Yes, sir.

Q. That also has on there, "Agent for Republic Lines," and that was prior to the termination by some twenty days, wasn't it?

A. That is right.

Q. And then obviously you must have been an agent for Republic officially.

A. I don't have the exact dates, Mr. Groen. I can tell you this: We can support the termination before this new agency was gone into. It would have to be that way, because none of the carriers would tolerate a dual representation besides the Government.

Q. Isn't it a fact the controversy with National Van Lines about clearing and discounts and prompt payments was [212] in effect some six months prior to cancellation.

A. The problem of payment had gone on for a couple of years.

(Testimony of Alfred Edward Dean.)

Q. And you had in mind of canceling the agreement?

A. No. They merely found it difficult to stay up to date. They were always in arrears.

Q. Didn't they pay just once a month?

A. No, no; nothing like that. They paid whenever they got hold of some money.

Mr. Groen: This letter is offered as No. 56.

The Court: Received.

(The document heretofore marked Plaintiff's Exhibit 56 was received in evidence.)

Q. By Mr. Groen: Didn't you testify, Mr. Dean, that immediately upon termination of your license agreement, or agent agreement with plaintiff you became agent for North American? Didn't you say that a few moments ago?

A. I would like to clear that, if I may have an opportunity to explain it?

Q. Yes.

A. With Mr. McKee we had full coverage of all the States. When we terminated with him we had to ally ourselves with a carrier or combination of carriers, to effect service to the same territories. Therefore, we had to take agency with a combination of carriers, rather than any one [213] carrier. That is why we have the agency agreement with the North American people in the territory that our Republic affiliation could not service.

Q. Did you list North American as your affiliate on your letterhead, like you did Republic?

(Testimony of Alfred Edward Dean.)

A. I didn't have the opportunity, Mr. Groen. We didn't last with them very long.

Q. You didn't?

A. We didn't last very long with them.

Q. Did you have any other agency relationship with national shippers?

A. Yes. In order to effect service to the territory that represented a void in the Republic authority.

Q. Now, I think you testified also on your discovery deposition, did you not, Mr. Dean, that you received complaints or your office received complaints that were intended for National Transfer, to plaintiff, about some of their troubles they had? Did you answer yes?

A. You didn't give me an opportunity. Yes, sir.

Q. That is a fact, you received a number of those complaints in San Francisco and elsewhere?

A. No. I received some in Monterey, specifically.

Q. Your office in San Francisco received complaints of that nature, also, didn't they? [214]

A. Not to my recollection.

Q. You remember you had a Mr. Green there, who was the manager of your office?

A. Yes.

Q. You don't recall that he had reported to you that complaints were received there from the public about services of National Van Lines, the plaintiff? A. No, sir, I don't.

Q. But it is a fact your offices and probably you personally did receive some complaints that

(Testimony of Alfred Edward Dean.)

should have been directed to National Van Lines, the plaintiff? A. It is possible, yes.

Q. You testified that they didn't, didn't you?

A. I said in one area we had some specific—or they were called specifically to my attention. That was in the Monterey area.

Q. In other words, people who had received the moving service from plaintiff called your office and complained to you about the service, thinking that they had plaintiff's number, didn't they?

A. We were the only company advertising in that area at that time. We were advertising.

Q. You advertised under "National" with the stripe design, as the directory showed?

A. We were advertising National Transfer & Storage. [215] Mr. McKee apparently didn't have any representation.

The normal thing for those people to do was to call our office. They might have called National Car-loading or National Biscuit.

Q. But they called you.

A. Yes, some of them we know have.

Q. You wouldn't deny this also happened a number of times in San Francisco, where plaintiff did have an office and you also had an office, isn't that correct? A. I don't recall it, no.

Q. You wouldn't deny that that happened in San Francisco?

A. No, I wouldn't deny it, either; I don't know.

Q. Now, isn't it true, Mr. Dean, that you have recently applied for and received permission to

(Testimony of Alfred Edward Dean.)

operate or to take over the interstate business of Knowles Vans? A. Yes, sir.

The Clerk: Plaintiff's 57 for identification.

(The document referred to was marked Plaintiff's Exhibit 57 for identification.)

Q. By Mr. Groen: I will hand you this document marked for identification as Plaintiff's Exhibit 57, and ask you if you haven't seen that before, a decision from the Interstate Commerce Commission, granting your application to take over the Knowles Line? [216] A. I have.

Q. That is true? A. Yes.

Q. Do you know about this? A. Yes.

Q. This document throughout says, "Alfred Dean, doing business as National Transfer & Storage or Dean Van Lines". A. Yes.

Q. That is the way your petition was filed and that is the way the application was granted?

A. This action had been started back some time ago.

Q. This is dated October 12, 1954.

A. I indicated that the last petition to the Commission to make the change to "Dean Van Lines" was——

Mr. Von Herzen: It shows the date on which the names were used; November 1953.

Q. By Mr. Groen: This gives you authority now to operate in interstate commerce.

A. 46 states, yes.

Mr. Groen: The document is offered as Exhibit 57.

(Testimony of Alfred Edward Dean.)

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit 57 was received in evidence.)

Q. By Mr. Groen: How many States did you say?
A. 46. [217]

Q. Haven't you also operated in conjunction with Howard Van Lines in interstate commerce?

A. Yes, I have.

Q. Their van lines travel from coast to coast, isn't that right?

A. I think they have 39 to 40 States.

Q. In connection with their van lines or their vans, they have used the striped insignia with the words "National Transfer & Storage" or the word "National" and the striped insignia?

A. That is correct. I would like to clear the record, if I may. Those units are owned by us, but leased to them.

Q. Under whose authority are they operated?

A. Under the direction and control of the Howard people. We haven't the ability to go out of the State of California.

Q. It is a fact those units bearing the word "National" and stripe design unit travel in interstate commerce for you?

A. That is right; for Howard.

Q. For Howard in how many States?

A. I think it is 39 or 40 States.

Q. Did you advertise in directories service coast to coast prior to receiving this franchise or the right to purchase the Knowles Van Lines?

(Testimony of Alfred Edward Dean.)

A. No, sir.

Q. Do you recall the time this discovery deposition [218] was taken June 4th, Mr. Dean, and you were asked about your mark, the question specifically on page 6:

“Q. What was the occasion for adopting this design along with the name?”

We were talking about “National” and the stripe design. And you said:

“Oh, my feeling that it had a lot of trademark value, and I think that practically every company has some sort of trade-mark to identify their service.” Do you remember saying that?

A. Yes, I do.

Q. Of course, there is no dispute about that fact, is there? A. No.

Q. You said no? A. No; that is right.

Q. During your discovery deposition I also asked you to supply the figure with respect to your sales of services, your gross income since the termination of the agreement, up to date, and you reported yesterday that that was some five million one hundred seventy thousand two hundred forty-eight dollars, is that right?

A. Something like that.

Q. That is approximately right? [219]

A. Yes, sir.

Q. Did your sales increase in the year 1950 over the year 1949 in the State of California?

A. I believe so.

(Testimony of Alfred Edward Dean.)

Q. And they increased in '51 over the year '50, didn't they? A. I think so, yes.

Q. And they increased in '52 over '51, didn't they? A. I believe that is right.

The Court: We will take a brief recess.

(Short recess taken.)

Q. By Mr. Groen: Mr. Dean, it has been established that you were an agent for plaintiff National Van Lines and agents for Republic and one more. Who was that you just testified about?

Mr. Mason: All-American——

The Witness: North American Van Lines.

Mr. Fihe: Howard.

Q. By Mr. Groen: Howard. Were you agent for anyone else?

A. The relation with Howard is an interline relationship; not an agency.

Q. Have you been tied up with anyone else but the four mentioned?

A. Well, we have done business—we have the ability [220] to do business with any of the carriers that are participants in the same tariff, Mr. Groen, that we are given.

Q. Do you have direct relationship you had with National Van Lines?

A. Yes. The Interstate Commerce Commission gave us a privilege to interline with any carrier, any of the eight or nine hundred carriers.

Q. You were definitely tied up with plaintiff, with Republic——

(Testimony of Alfred Edward Dean.)

A. As an agency I was tied up with Mr. McKee.

Q. And with Republic?

A. And with Republic.

Q. With Howard?

A. No. With Howard I am interlining. I am getting the traffic in my name and holding hands with Mr. Howard, to effect service to the points I don't have any authority.

Q. Then you testified, too, I believe, you don't advertise under your name as doing business in 48 States or coast to coast business.

A. I do here. I do in California; it is my privilege.

Q. You have so advertised?

A. I surely have.

Q. That you have a 48-State coverage?

A. Yes.

Q. For Dean Van Lines? [221]

A. Right.

Q. And what is this arrangement with Howard? Does Howard operate in the 48 States?

A. Howard, I believe, has 39 or 40 States.

Q. That is not 48. A. No.

Q. What had Knowles you are just taking over? They don't have 48 States, either, do they?

A. No, they have 46 States.

Q. There is nowhere you have a direct 48-State coverage?

A. I do with combination of carriers, yes. For instance, I want to go to the Northwest. I can interline with people like Mac Hugo, Hunt Transfer

(Testimony of Alfred Edward Dean.)

Co., or anyone that is a participant in the same tariff.

Q. Then you do advertise your own company in California as 48-State coverage then, don't you?

A. That is right.

Mr. Groen: That is all.

Redirect Examination

By Mr. Mason:

Q. Mr. Dean, with respect to this Knowles permit which you obtained the Interstate Commerce Commission permission to take over, and in which decision you are mentioned as the National Transfer & Storage Co., when was the application for that filed? [222]

A. Late November of '53, Mr. Mason.

Q. So that in between the time you filed this application and the time this was handed down in October 1954 you had changed your name?

A. Correct.

Q. Now, is this in force now, this—

A. No, that is awaiting a petition for reconsideration, that has been filed by the protestants to that, in that case.

Q. So that you have not yourself had interstate shipments as yet.

A. No, sir.

Q. There was some mention made in your cross examination about a photograph of the Howard Van Lines, which shows on the bottom part of it, "National Transfer & Storage Co." with your map.

A. Right.

(Testimony of Alfred Edward Dean.)

Q. Has that been changed on those Howard Van Line trucks? A. Yes, it has.

Q. What does it show now?

A. It shows Dean Van Lines.

Mr. Mason: That is all.

Mr. Groen: No further cross.

(Witness excused.)

The Court: Call the next witness. [223]

Mr. Mason: I will call Nicholas Shishkoff.

NICHOLAS SHISHKOFF

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated.

Your full name, sir?

The Witness: Nicholas Shishkoff.

Direct Examination

By Mr. Mason:

Q. What is your business, Mr. Shishkoff?

A. I am the manager of the van lines division of Dean Van Lines.

Q. How long have you had that position?

A. Since the 1st of November, 1954.

Q. What was your experience in the van lines business up to that time?

A. My experience in the van lines business dates back to 1946, at which time I became associated with an Illinois corporation called the Atlas Van

(Testimony of Nicholas Shishkoff.)

Lines, and I continued with that corporation through its succession to a Delaware corporation, and was with them until January of 1953 in the capacity of operations manager and subsequently general manager.

At that time I left that company and became associated with the American Red Ball Transit Company of Indianapolis, Indiana, in the capacity of assistant general manager. [224]

Q. Do you have any familiarity with the various van lines operating in the United States?

A. Yes, I have.

Q. Do you know of any transfer and storage company other than the plaintiff, National Van Lines, which uses the word "National" as a prefix to its name?

A. Yes, I do.

Q. Can you name some of those with which you are personally familiar?

A. There is the company owned by Mr. Abe Mechanic of Milwaukee, Wisconsin, National Van Lines.

Q. How long have you known of that company?

A. Since 1949. There is National Movers of West New York, New Jersey, I believe it is.

Q. Where do they operate, do you know?

A. National Movers operates to various States. I think their franchise covers some twenty or twenty-five States.

Then there is another company in New York City known as National Moving & Warehouse Corpora-

(Testimony of Nicholas Shishkoff.)

tion. That also has a considerable franchise and operates in about the same number of States.

Q. Any more?

A. Those are the companies using the word "National." There is a variation, there is a Nation-Wide Van Lines in New York. I don't know whether that is material or not. [225] Those are the ones I think of offhand.

Q. Have you ever heard of the National Car-loading Corporation? A. Yes, I have.

Q. What kind of a business does that carry on?

A. They carry a freight forwarding business, which includes the forwarding of crated household goods, and the forwarding of household goods in what is known as a wrap and pad proposition.

Q. Where do they do business?

A. They do business throughout the country.

Q. Is that an old company?

A. Yes, it is.

Q. Do you know of any transfer and storage companies in the United States that use a shield having vertical red and white stripes on it, like the plaintiff's, National Van Lines?

A. Well, the one that—the transportation—did you say transportation or transfer companies?

Q. Transfer companies.

A. The one I think of at the moment is All-American here in Los Angeles. I don't think of any others at this time.

Q. Do you know of any that use maps on their vans?

(Testimony of Nicholas Shishkoff.)

A. Yes, Nation-Wide Van Lines of New York is one I [226] recall offhand that uses a map on its vans. There are others that I recall that carry it on their stationery.

Nation-Wide Van Lines also carries it on its stationery. And there are one or two other companies, at least, that carry it as a background item on their letterheads.

Q. Do you know of any transfer companies operating in Los Angeles, other than the National Van Lines, which has the word "National" as a prefix to its name?

A. Since my association here on the West Coast is just a little over a month old, I don't recall any offhand. I am not familiar with very many of the companies.

Q. During your service with Dean Van Lines, has any instance of public confusion as between the plaintiff corporation and the defendant ever come to your attention? A. None.

Mr. Mason: That is all.

Cross Examination

By Mr. Groen:

Q. Mr. Shishkoff, did you ever see a mark or a name in this industry or this line of service that was dominated by the word "National" and vertical stripes together?

Mr. Mason: I object to that as calling for a conclusion.

(Testimony of Nicholas Shishkoff.)

Mr. Groen: I asked if he ever saw it.

The Court: Overruled. [227]

Mr. Mason: As to whether it was dominated or not; that is something for the court.

The Court: It will be for the court to conclude.

Mr. Groen: I will rephrase my question.

Q. By Mr. Groen: Did you ever see a name identifying indicia or trade name that had "National" and the vertical stripe design together?

A. I don't recall any.

Q. You never saw one?

A. I don't recall any.

Q. You have had a rather wide experience in this field for a number of years?

A. That is right.

Q. But you did see plaintiff's, of course?

A. Yes.

Q. You are familiar with this Exhibit 15 enlarged?

A. Yes, but until called to my attention I didn't realize it contained vertical red and white stripes.

Q. You never saw a combination with "National" and vertical stripes like this in this field prior to this time?

A. I don't recall ever having, no.

Mr. Groen: That is all.

Mr. Mason: That is all.

(Witness excused.)

Mr. Mason: Mr. Fisher. [228]

PAUL TUCKER FISHER

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated.

Your full name, sir?

The Witness: Paul Tucker Fisher.

Direct Examination

By Mr. Mason:

Q. What is your business, Mr. Fisher?

A. I am a branch manager for Dean Van Lines in the Los Angeles area.

Q. How long have you held that position?

A. Since July 1, 1953.

Q. What are your duties?

A. The operations and administration of the business of Dean Van Lines in this area.

Q. Had you had any experience in the transfer and storage business prior to that time?

A. Yes, sir, my experience dates back to November of 1933 when I became associated with Bekins Van & Storage Co., and was associated with them from that time until 1951, when I became associated with Pierce Rodof of San Francisco for a period little in excess of a year.

I came with Dean Van Lines in, as I stated, July of 1953. [229]

Q. Are you somewhat familiar with the various transfer and storage companies operating in the United States?

(Testimony of Paul Tucker Fisher.)

A. Yes, from the standpoint of agencies which we enjoyed during the period of time I have been in this business.

Q. Have you observed their vans operating?

A. Yes.

Q. Do you know of any transfer and storage companies, other than the plaintiff National Van Lines, Inc., which uses the word "National" as a prefix to its name?

A. National Carloading Company is probably the most prominent and the oldest which engages in the movement of household goods, both by crated and uncrated method, throughout the United States.

National Movers, Incorporated, of New Jersey is one whose vans I have seen out here, and whose letterheads I have had occasion to see.

National City Transfer & Storage Co. of National City uses the name "National".

There are numerous other ones that have been mentioned, that I am not personally familiar with, that I have seen from time to time, either letterheads or vans.

Q. Do you know of any such companies which use the shield having vertical red and white stripes, such as that used by the National Van Lines?

A. The one that comes to mind most quickly is the [230] All-American Transfer & Storage.

Q. Where is that? A. Of Los Angeles.

Q. Any others?

A. That is the only one that comes to mind.

Q. Now, in the course of your work for the

(Testimony of Paul Tucker Fisher.)

Dean Van Lines, has it ever come to your attention that anyone, any member of the public was confused as between the plaintiff National Van Lines, Inc. and the defendant?

A. No, not in the sense that two firms were confused. Being in Government work where we are contractors, the people whose goods are being moved out here are often informed that the goods will come to us as the contractor handling the storage. As a consequence we have received calls asking the whereabouts of their goods being moved by many firms, not primarily or necessarily National Van Lines, but many other firms; North American Van Lines, Mayflower, and the like.

But there has been no question of any association that has come to my attention of the two names, of the similarity.

Mr. Mason: You may cross-examine.

Cross Examination

By Mr. Groen:

Q. How long did you say you were with Mr. Dean? A. From July 1, 1953.

Q. What was the total length of your experience in [231] this field of moving and storage?

A. From November of 1933.

Q. Did you work in various parts of the country? A. In California.

Q. California only? A. Yes.

Q. Did you ever see others in this field use a name or combination of words and indicia showing

(Testimony of Paul Tucker Fisher.)

“National” and the vertical stripes, besides plaintiff and defendant?

A. I believe that the only two that come to mind, other than All-American, are the two that have been mentioned, the plaintiff and the defendant.

Q. Does All-American use the word “National” with it?

A. No, I believe not; only the stripes.

Q. You don’t know of anyone that uses “National” and the vertical stripe design, besides the plaintiff and the defendant? A. No.

Q. You said that with respect to some Government contracts that you did receive calls for or inquiries from the public about shipments from various lines over at defendant’s office. How many calls on an average would you say you received a month or a week?

A. That would be difficult for me to answer, for the [232] company as a whole, because I haven’t received them all. It is not unusual for us to receive such calls, because we have on the average of three to four vans of other companies calling at our warehouse daily, to discharge the goods belonging to personnel of the Government.

Q. Those are shipments then that they should send inquiries to you about.

A. Not necessarily, sir. The carrier actually was not Dean Van Lines. We were merely the receiving warehouse, by reason of having a contract.

Q. You had some connection with the shipment then?

(Testimony of Paul Tucker Fisher.)

A. Only upon receipt here. We have no knowledge of it prior to its arrival here.

Q. Did you ever have any, that is, any occasion to receive shipments that involved plaintiff, which came into your yards or your lot?

A. Yes, indeed, just as we have all the others. They enjoy traffic from the Government, just as all the other companies do.

Q. Whom were you with just prior to coming with Mr. Dean?

A. Immediately prior to that I did some special work for a gentleman in Oakland by the name of Jack Andrews with Checker Van & Storage. It was of a temporary nature.

Prior to that, with Pierce Rodof of San Francisco. [233]

Mr. Groen: That is all.

Mr. Mason: That is all.

(Witness excused.)

Mr. Mason: I have one more witness, your Honor, but I dismissed him at noon and he hasn't shown up. So I would like, in lieu of calling Mr. McKee, to offer his discovery deposition.

The Court: Received.

The Clerk: Defendant's OO.

(The document referred to was marked Defendant's Exhibit OO and was received in evidence.)

[See pages 415-494.]

Mr. Mason: Defendant rests, your Honor.

Mr. Groen: I would like to recall Mr. McKee for about two questions, and that is all I have.

The Court: If you just have that many, ask him from where he is. If you are really going to ask a number of questions, we will put him back on the stand.

Mr. Groen: He just stepped out to a phone. Would you see if you could find him?

Mr. Fihe: Yes.

Mr. Groen: If we may have just a moment, please. Your Honor, while we are waiting, I would like to make this suggestion: Could we withdraw the exhibits during the briefing time and use them? There are a lot of things we may want to look over. [234]

The Court: What about that, Mr. Mason?

Mr. Mason: I have no objection to it, your Honor. I have never done it in this jurisdiction. We do it in the East quite a bit.

The Court: It is agreeable with the court that an exhibit be withdrawn for use of counsel during the briefing time. But it will be a little awkward if you both want to look at the same time.

Mr. Groen: What is the procedure on briefs, simultaneous briefs?

The Court: I think it is better to have the plaintiff first and then the defendant, and then the plaintiff to answer.

Mr. Groen: In that event, could plaintiff withdraw the exhibits and then with the brief forward them to the defendant, and the defendant will have

them, and from there they can go back to the court.

Mr. Mason: That is agreeable.

The Court: I think they had better always be returned to the court, and let the party who is going to get them come to court and get them, so you don't have the possibility of a question of what was received.

Mr. Groen: Is it understood on the record when the transcript is written up that we may receive from the clerk all the exhibits and forwarded to us, so that I will have Mr. [235] Fihe, my local associate, take care of that.

When I am through briefing I will send them back to the court and Mr. Mason can withdraw them.

FRANK L. McKEE

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Groen:

Q. You examined Defendant's Exhibit MM, giving a tabulation of sales figures for the years 1944 through 1953, did you not?

A. Yes, sir.

Q. And you have heard Mr. Dean testify that about four per cent, roughly, of these gross figures were attributable to business that he booked for National Van Lines, isn't that right?

A. Yes, sir.

(Testimony of Frank L. McKee.)

Q. And that he remitted that to you?

A. Yes, sir.

Q. Now, you took one of those years at random, did you?

A. I took 1949 revenue, line haul revenue.

Q. And that figure, according to this exhibit, shows gross of \$409,534.71, or roughly \$409,000.00 as being the [236] gross for the year by Mr. Dean's company, is that right? A. That is right.

Q. Did you endeavor in the meantime to ascertain what the remittance by Mr. Dean's firm, the defendant, to your firm for the year 1949 was?

A. Yes, sir.

Q. What did you find?

A. I was given a figure by the Chicago office of \$204,718.00.

Q. That you received from Mr. Dean during 1949.

A. That is the amount of line haul business that National Transfer & Storage turned in to National Van Lines, Inc.

Q. For that year. A. For that year.

Mr. Groen: That is all.

Cross Examination

By Mr. Mason:

Q. Do you know whether or not all of that was for the year 1949?

A. Yes, sir, that was taken off of the monthly statements for all 12 statements, totaling that figure.

(Testimony of Frank L. McKee.)

Q. And that was the gross business that he had booked for the National Van Lines?

A. Yes, sir, that was the line haul business.

Mr. Mason: That is all.

(Witness excused.)

Mr. Groen: I think both sides rest then?

Mr. Mason: Defendant rests.

Mr. Groen: Plaintiff rests, your Honor.

The Court: This case has been on our books for quite some time, so I don't suppose there is any need for great rushing in the briefing. Still we ought to get the case closed.

I would like very much to get it at issue on the law during the first quarter of 1955.

Mr. Groen: So would we.

The Court: What is your pleasure about briefing time?

Mr. Groen: May plaintiff have, say, 30 days after the delivery of the record?

The Court: All right. How much time do you want, Mr. Mason?

Mr. Mason: Well, I would like a like period.

Mr. Groen: May I have 10 days or 15 days for reply, if necessary?

The Court: All right. The order will be that the plaintiff will have 30 days from the date of delivery of the last of the transcript being transcribed within which to file an opening brief, and plaintiff may withdraw any or all of the exhibits for use in

connection with the preparation of the [238] brief; the exhibits to be returned when the brief is filed.

The defendant will have 30 days from the time that plaintiff's brief is received within which to file defendant's brief, and defendant will have a like privilege with respect to the exhibits and a like obligation to return them.

The plaintiff will then have 15 days within which to file a reply brief. And if a reply brief is not filed at the end of 15 days, the cause will nonetheless stand submitted at the end of the 15 days after receipt by the court of the defendant's brief.

Mr. Groen: Defendant will file something in reply, either a short brief or a statement. No further brief will be forthcoming.

The Court: Well, with that, I don't suppose you wish to argue the case orally today.

Mr. Groen: I would like to avoid that.

Mr. Mason: Counsel tells me he wants to catch a plane for the East.

The Court: All right, then, we will have the case submitted during the first quarter, assuming that the transcript can be speedily transcribed. I don't know just how many orders are ahead of you.

Mr. Groen: That is beyond our control.

The Court: All right.

(Whereupon, at 4:00 o'clock p.m., Friday, December 17, 1954, the hearing in the above-entitled cause was adjourned.) [239]

[Endorsed]: Filed Dec. 7, 1955.

PLAINTIFF'S EXHIBIT No. 48

[Title of District Court and Cause.]

DEPOSITION OF MARY R. MARTIN

Be It Remembered, that on Saturday, the 12th day of June, 1954, at 4:55 o'clock p.m., pursuant to Notice of Taking Deposition, at 85 Maitland Drive, Alameda, California, personally appeared before me, M. W. McGill, at notary public, Mary R. Martin, called as a witness on behalf of the plaintiff in the above entitled action.

Messrs. Wilkinson, Huxley, Byron & Hume, represented by Gerrit P. Groen, Esquire, appeared as attorneys for the plaintiff; and

Howard B. Turrentine, Esquire, C. P. Von Herzen, Esquire, and S. L. Laidig, Esquire, represented by John J. Whelan, Esquire, appeared as attorneys for the defendant.

The said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the deposition be reported by M. W. McGill, a duly certified reporter and a disinterested person, and thereafter transcribed into typewriting, to be read to or by the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated and that all objections to questions propounded to the said witness shall be

Plaintiff's Exhibit No. 48—(Continued)
(Deposition of Mary R. Martin.)

reserved by each of the parties, save and except any objections as to the form of the questions propounded.

It was further stipulated that M. W. McGill, a notary public in and for the City and County of San Francisco, State of California, might act as notary public.

MARY R. MARTIN

called as a witness on behalf of the plaintiff, being first duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

Mr. Groen: Q. Will you state your full name and address, Mrs. Martin?

A. Mary R. Martin, 85 Maitland Drive, Alameda.

Q. And that is California? A. California.

Q. And are you a housewife, Mrs. Martin.?

A. Yes.

Q. And how long have you lived here?

A. At this address?

Q. Yes. A. Since the first of February.

Q. And where did you live previously?

A. 1535 Pearl, Alameda.

Q. Mr. Martin is in the armed services?

A. Yes.

Q. And what is his rank? A. Captain.

Q. And it has been necessary for you to move

Plaintiff's Exhibit No. 48—(Continued)

(Deposition of Mary R. Martin.)

from time to time because of Captain Martin's travels? A. Yes.

Q. And were you moved at one time by National Transfer & Storage Company? A. Yes.

Q. Will you tell us when that was, approximately?

A. It was in September, two years ago—it will be two years this September.

Q. And from where to where did you move at that time?

A. They picked it up in storage in San Diego and brought it here to 1535 Pearl.

Q. And "they" is National Transfer & Storage Company? A. Transfer & Storage, yes.

Q. And did you have reason to complain about that particular movement that they handled for you?

A. Yes, I did, for the simple reason that—

Q. Well, just answer the question first. You did have some reason to complain? A. Yes.

Q. And what did you do and where did you call with respect to that complaint?

A. I called—I looked in the telephone book under National, and I called San Francisco, thinking that would be the head office, and they informed me that they didn't have—

Q. Who did you call?

A. National Van.

Q. You know you are saying National Van and not National Transfer? A. Yes.

Plaintiff's Exhibit No. 48—(Continued)
(Deposition of Mary R. Martin.)

Q. All right. Proceed, please.

A. And I assumed National—I should have taken more time to look on the papers that I had and called National Transfer, but National—I called National Van in the telephone book.

Q. And you called National Van, then, in San Francisco? A. Yes.

Q. And what did you tell them?

A. I told them that wanted to talk to Mr. Green, I believe, and that I wanted to put in a complaint about the move, and a girl that I talked to there said that she didn't think they had moved me, and I said, "Well, I am sure that you did," and so she checked and said, "No, the Mr. Green you want is Mr. Green of National Transfer."

Q. Did you tell her what you wanted at the time?

A. No, I just wanted to talk to Mr. Green, and then I looked up in the telephone book and found there was a National Transfer & Storage.

Q. At that time did you also note that besides the name National there was an insignia or design associated with the name National?

A. In the telephone book?

Q. Yes, that is the classified. That is what you looked at?

A. Yes, that's what I looked under; yes. I don't recall.

Q. Do you recall that you told National Van

Plaintiff's Exhibit No. 48—(Continued)

(Deposition of Mary R. Martin.)

when you called them in error the first time what your complaint was?

A. I don't think I did.

Q. You don't remember?

A. I don't remember, and I am sure I didn't. When the name Green was brought up, she told me I wanted the other company.

Q. You say "she." Was it possible you talked to a man there?

A. No, it was a woman.

Q. And you don't know who it was?

A. No.

Q. And she told you to call National Transfer & Storage? A. That's right.

Q. What was your complaint against National Transfer?

A. Well, over things that were lost and the way that they handled the move when they brought me in—moved me into the residence.

Q. Would you explain that a little more fully?

A. The things were in storage, and they were stored—they were picked up from the residence in San Diego by one company, and I believe the name was Heck, and then National Transfer picked it up from Heck's Storage and brought it up, and everything that I complained about the men shrugged their shoulders and said, "We didn't do it; Heck did," and when you are getting the complete run-around and you are alone—my husband was in Japan at that time, also—why, there wasn't much

Plaintiff's Exhibit No. 48—(Continued)

(Deposition of Mary R. Martin.)

I could do about it, but when things turned up missing, such as a television antenna pole that we had used in the desert, which is, I think, forty feet, and it telescopes. You know the kind I am referring to?

Q. Yes.

A. And they are quite expensive, and thinking that we would in time be back in a zone where we will need a large antenna like that, I naturally wanted it, and I asked them where it was, and they said they didn't know, and they also brought my clothes in in boxes, and that included wardrobes, and they laid them on the davenport; they did not take them upstairs and put them in the closet, and I had been moved and unpacked before, and that is customary to put them in the closet.

Q. In other words, you had a complaint about the type of service? A. Yes.

Q. And with that in mind, you first called National Van Lines? A. Yes.

Mr. Green: Your witness.

Cross Examination

Mr. Whelan: Q. Mrs. Martin, as I understand it, your goods were transferred from San Diego to 1535 Pearl Street? A. Yes, sir.

Q. And the company that delivered it to that address was National Transfer & Storage Company? A. Yes.

Q. Did they give you any papers to sign?

Plaintiff's Exhibit No. 48—(Continued)
(Deposition of Mary R. Martin.)

A. Yes.

Q. And how long after the goods were delivered did you call up the National Van Lines and make this complaint?

A. This was within—they delivered the goods on Saturday, and this was Monday, and I did not sign the papers that the driver wanted me to sign when the furniture was delivered because of the loss and difficulty in service and their rudeness, for one thing.

Q. When you called National Van Lines, you were assuming that the people who had delivered the goods to you had their head office in San Francisco? A. Yes, I was.

Q. And you did not look in an Oakland directory?

A. Well, I looked in the Alameda directory that I had, which included Oakland, and I believe that National Van has their San Francisco number in there, if you'd care to look.

Q. When you called National Van in San Francisco—National Van Lines in San Francisco, you talked to a woman in the office? A. Yes.

Q. And you explained what your problem was and everything else? A. Yes.

Q. You are sure it was a woman?

A. Well, if I know a woman's voice, it was a woman. Of course, I could be fooled on that.

Q. Then you subsequently contacted National Transfer & Storage Company? A. Yes.

Q. In Oakland?

Plaintiff's Exhibit No. 48—(Continued)
(Deposition of Mary R. Martin.)

A. Yes. This time I was more diplomatic. I asked if they had moved Martin to this address.

Q. When you first called National Van, you didn't ask if they had moved you?

A. No, I called with hell and fury popping out of both mouth and eyes.

Q. You mentioned that you were calling for a Mr. Green? A. Yes.

Q. Where did you get the name Mr. Green?

A. From the drivers.

Q. From the drivers?

A. Yes—or the driver.

Q. The driver. They didn't make any mention to you that Mr. Green was with National Van, did they?

A. No, I assumed that Mr. Green was head of National Transfer & Storage office that they worked out of. I mean I didn't realize whether it was in Oakland or San Francisco.

Q. Was there anything on the receipt that you were given to sign, which you didn't sign, that indicated San Francisco or Oakland, as you recall?

A. No, sir, I don't recall.

Q. There was nothing on that receipt, as you recall, that said National Van Lines?

A. No, sir, I don't.

Mr. Whelan: I have no further questions.

Mr. Groen: That is all. Deposition is closed.

/s/ MRS. MARY R. MARTIN

Plaintiff's Exhibit No. 48—(Continued)

(Deposition of Mary R. Martin.)

State of California,

Northern District of California,

City and County of San Francisco—ss.

I hereby certify that on Saturday, the 12th day of June, 1954, at 4:05 o'clock p.m., before me, M. W. McGill, a notary public, at 85 Maitland Drive, Alameda, California, personally appeared pursuant to Notice of Taking Depositions, Mary R. Martin, called as a witness on behalf of the plaintiff; and Messrs. Wilkinson, Huxley, Byron & Hume, represented by Gerrit P. Groen, Esquire, appeared as attorneys for the plaintiff; and Howard B. Turrentine, Esquire, C. P. Von Herzen, Esquire, and S. L. Laidig, Esquire, represented by John J. Whelan, Esquire, appeared as attorneys for the defendant; and the said Mary R. Martin being by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and being carefully examined, deposed and said as appears by her deposition hereto annexed.

And I further certify that the said deposition was then and there reported by me, a duly certified reporter and a disinterested person, and was transcribed by me; and I further certify that at the conclusion of the taking of said deposition, and when the testimony of said witness was fully transcribed, said deposition was submitted to and read by said witness and thereupon signed by him in my presence, and that the deposition is a true record of the testimony given by said witness.

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Francisco, State of California, Robert W. Adams, called as a witness on behalf of the plaintiff in the above-entitled action.

Messrs. Wilkinson, Huxley, Byron & Hume, represented by Gerrit P. Groen, Esquire, appeared as attorneys for the plaintiff; and

Howard B. Turrentine, Esquire, C. P. Von Herzen, Esquire, and S. L. Laidig, Esquire, represented by John J. Whelan, Esquire, appeared as attorneys for the defendant.

The said witness, having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the deposition be reported by M. W. McGill, a duly certified reporter and a disinterested person, and thereafter transcribed into typewriting, to be read to or by the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

Mr. Groen: These depositions are taken pursuant to notice, served upon counsel for defendant May 28, 1954.

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

ROBERT W. ADAMS

called as a witness on behalf of the plaintiff, being first duly cautioned and sworn by the notary public to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

Mr. Groen: Q. Will you please state your full name and address, Mr. Adams?

A. Robert W. Adams.

Q. Where do you reside?

A. 670 Lombard Street, San Francisco.

Q. What is your occupation?

A. Claims adjuster for Bekins Van & Storage.

Q. How long have you been in that capacity?

A. Nine months.

Q. What were you doing prior to that?

A. Prior to that I was with Peters & Sons on a temporary basis?

Q. And prior to that?

A. With National Van Lines.

Q. How long were you with National Van Lines?

A. Approximately six years.

Q. Will you briefly describe your duties during that period with National Van Lines?

A. Yes. I started off as a billing clerk in Los Angeles, and was transferred to San Francisco in March of '49, where I did dispatching and later

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

office manager and, then, later manager for the San Francisco bay area.

Q. About how many people, on the average, were there in the San Francisco office of National Van Lines? A. I'd say it varied—

Mr. Whelan: Pardon me. At what time?

Mr. Groen: Q. During this period of your employment.

A. One time there was six. It varied between five and six.

Q. And were you familiar with all major matters that occurred in the office at that time?

A. Yes.

Q. Are you familiar with the National Transfer & Storage Company? A. Yes.

Q. And are they in San Francisco?

A. No, they are in Oakland.

Q. Do they operate around this general area?

A. Yes, they do, extensively.

Mr. Whelan: Would you read that last answer back to me?

(Answer read by reporter.)

Mr. Groen: Q. Do you know whether or not National Transfer & Storage was at one time agents for National Van Lines, Inc.?

A. Yes, they were.

Q. And were they agents for National Van Lines, Inc., at the time you began your employment with National Van Lines?

A. Yes, they were.

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

Q. And did you have much contact with National Transfer & Storage Company? A. Yes.

Mr. Whelan: I'd like to object to the form of that question and the answer, and ask you if you would mind asking just what he knows about it.

Mr. Groen: Well, that will develop.

Mr. Whelan: Yes.

Mr. Groen: Off the record.

(Unreported discussion.)

Mr. Groen: What's the last on the record?

(Record read by reporter.)

Mr. Groen: Q. Will you explain what that contact was with National Transfer & Storage, what the character of it was?

A. It was in connection with orders which they would be taking for National Van Lines as an agent for National Van Lines: The arrangement of dispatch, arrangement of packing. Sometimes it dealt in questions on their statement or incoming shipment which they might have booked for National that were coming from the east.

Q. Now, that was at the time they were official agents for— A. That's right.

Q. —National Van?

A. That's right.

Q. And that contact, I take it, was frequent, a daily occurrence or—

A. Daily, sometimes five and six times a day, yes.

Q. Are you familiar with the fact that the con-

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

tract of the agency with National Storage was cancelled? A. Yes.

Q. Do you remember roughly when that was?

A. I believe February, 1950.

Q. Did you still have any occasion to contact National Storage, or they to contact you, since that time? A. Yes.

Mr. Whelan: May I ask you to bring out one point: When did he leave National Van Lines?

Mr. Groen: Q. When did you leave National Van Lines? A. In May of 1953.

Mr. Whelan: O.K.

Mr. Groen: Q. What was the nature of the contacts you had with National Storage, or National Storage with you, after the termination of the agency agreement which you indicated was around February of 1950?

A. Telephone calls in connection with customers that would call in and be under the impression that they were—had called National Transfer & Storage, and we would—

Mr. Whelan: Well, I am going to make a motion to strike that answer on the ground that it's very ambiguous.

Mr. Groen: We will develop it.

Mr. Whelan: And not responsive.

Mr. Groen: Let him finish his answer.

Q. What was the nature of those calls?

A. They resulted from calls coming into our

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)
office that were intended for National Transfer & Storage.

Q. How do you know they were intended for National Transfer & Storage?

A. When the people called in, either for a complaint or to check for service, we'd ask their name and find that, in checking our records, we had no order for them or had no record——

Q. Then what would you?

A. ——of their name. Then, in questioning the person who had called in, we would find that they were under the impression they were calling National Transfer & Storage.

Q. Did you know then they were really trying to get in touch with National Transfer instead of National Van?

A. Yes, we would. In many instances, they would—we would call National Transfer and ask them if they had records of such a shipment or customer, and they would say yes, and we would tell the party to get in touch with National Transfer or have National Transfer call the party direct.

Q. Did that happen very frequently?

A. Yes, it did.

Q. And did that happen continuously until you left the employ of National Van, to your knowledge?

A. Yes, it did.

Q. And those occasions were always brought to your attention, or you were a party to the transactions?

A. Yes, definitely.

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Q. And did you ever get calls from National Transfer at your office at National Van regarding any calls that they may have had for your office?

A. Would you ask that again?

Mr. Groen: Would you repeat the question, please?

(Question read by reporter.)

The Witness: Once or twice.

Mr. Groen: Q. Who did you deal with at National Transfer, if you recall, since the termination of this agreement?

A. Mr. Green.

Q. Any one else?

Mr. Whelan: Mr. who?

Mr. Groen: Green.

The Witness: Green. No.

Mr. Whelan: Did I understand that his answer is the only man he dealt with was Mr. Green?

Mr. Groen: Yes.

Q. You don't recall any others now?

A. I don't recall any at the moment.

Q. Mr. Green was in charge of National Transfer's office here, to your knowledge?

A. To my knowledge at that time, yes.

Q. Did you make any records or memoranda regarding calls from customers, or others, regarding incidents of confusion or mistake?

A. Yes, I did.

Q. Did you keep records of all of them or—

A. No, at first we didn't, because we hadn't thought of it, but when they came in such numbers

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

that we thought it would be wise to record each one of them.

Q. Now, I am going to hand you a few of those memoranda to——

Mr. Whelan: May I see them first?

Mr. Groen: Just a moment.

Q. (Continuing): ——refresh your recollection as to some of these incidents and ask you if you are familiar with them, and if so, whether you will tell us the details surrounding them as you recall them personally?

Mr. Whelan: Before you question him, Mr. Groen, may I look at them a second?

Mr. Groen: Just a minute.

(Mr. Whelan examines documents.)

Mr. Groen: Q. What is the memoranda you have there?

A. (Examining document.) This is in connection with a call that we received from a Mr. R. C. Allen. He was asking for Mr. Green, who works for National Transfer & Storage. Mr. Allen had sold him some cartons—or had sold National Transfer some cartons, and was inquiring to see if they would like to purchase some more.

Q. And do you personally recall that incident?

A. Yes, I do.

Q. Do you know what you did with the inquiry?

A. We informed him that Mr. Green was with National Transfer, and gave him National Transfer's number.

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Q. I hand you another memorandum purporting to come from your office, and ask you if you will look at that and advise if that refreshes your memory about another incident of this character?

A. (Examining document.) Yes, it does.

Q. What are the——

A. This is a case where the mail brought a letter addressed to National Van Lines at our address, and the invoice inside was for National Transfer & Storage in connection with some fibre drums that they had purchased.

Q. What did you do with it, if you recall?

A. We put it in another envelope and forwarded it to National Transfer.

Q. I have handed you another memorandum and ask if you are familiar with the details expressed therein?

A. (Examining document.) Yes, this is in connection with a woman who called in regard to the crating of her shipment for overseas.

Q. Is her name given?

A. Yes, Mrs. Reiss, R-e-i-s-s.

Q. And do you remember that incident yourself?

A. Yes, I do; and National Transfer & Storage had the crating contract for the navy.

Q. Do you remember what you did with that?

A. Yes, I gave her the telephone number for National Transfer, had her contact them.

Q. Here is a memorandum dated June 30, '52, regarding a claim from a P. G. Slattery, and I

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

will ask you to look at that memorandum and see if that refreshes your recollection about that incident?

A. (Examining document.) Yes, this is in connection with a call we received from Bekins in Oakland, and Bekins had delivered the shipment which had been in storage at National Transfer & Storage's warehouse, and the customer had filed a claim, and Bekins was trying to get in touch with National Transfer & Storage to settle the claim for the customer and find out just where the liability laid as to her claim, and they called National Transfer—rather, National Van Lines, thinking they were getting in touch with National Transfer & Storage.

Q. Is Bekins another transfer company in Los Angeles? A. Yes.

Q. In this area?

A. They are; which means even within the industry, itself, is confusing.

Mr. Whelan: I am going to object to that last answer, Mr. Reporter, and ask it be stricken as not responsive.

Mr. Groen: Q. Here is another memorandum dated March 5, 1952, and I will ask that you look at that and tell us what, if anything, it contains that refreshes your memory as to similar incidents?

A. (Examining document.) Yes, this is a call from Camp Stoneman in connection with a shipment coming in from the east for Sergeant Gersatness. They wanted to know when it would be in,

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(Deposition of Robert W. Adams.)

and we had no record of it, so we teletyped our Los Angeles dispatch to see if they had any record of it, which they didn't. We later learned that the shipment was coming in via Howard Van Lines.

Mr. Whelan: Now, I am going to object to any further testimony on this line unless you are answering a question, Mr. Adams. Now, you said they "learned." I'd like to know if he learned.

The Witness: Pardon?

Mr. Whelan: You said you later learned it must have ended up in National Storage. I want to find out if that is just hearsay, or did you, yourself, personally find out?

The Witness: No, we did find out that the shipment was coming through Howard Van Lines by the transportation office at Camp Stoneman.

Mr. Groen: I think we should bear in mind that Mr. Adams has testified he was in charge of that office, and it was a small office, just a few people, and he knew about all these things personally as they occurred.

The Witness: That's right.

Mr. Groen: Q. Is there any other comment about that incident? Do you know what happened to it, how it was finally adjusted?

A. Yes. The transportation office finally checked back through their own channels to the east and clarified the matter; so that they did get in touch with National Transfer.

Q. Here is another such memorandum dated the

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

3rd of March, 1952. I will ask you look at that and explain if there's anything in there that you are personally familiar with that this refreshes your memory on.

A. (Examining document.) Yes, this is in connection with a lady who called in and wanted to speak to a Mr. Green, and we told her——

Q. Called in to where?

A. Called in to the National Van Lines office and asked for Mr. Green. We told her we didn't have a Mr. Green, and she said, "Well, he is the dispatcher there," which, knowing that Mr. Green is—was with the National Transfer & Storage and——

Q. Did you know that personally, that he was with National Transfer?

A. Yes, I did. And I also knew personally that he was dispatcher over there, or did a certain amount of dispatching, and I gave the lady the telephone number for National Transfer.

It also concerns a call from Mrs. Higbee. She wanted to know when the drivers would be at her residence to load the furniture, and we checked our records and found that we had no such shipment, and we then called National Transfer & Storage, and they told us that the—their records had the—I should say the shipment was on record in their office.

Q. Here is another memorandum, Mr. Adams, regarding a conversation with a Mrs. J. W. Roddy.

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Will you look at that, and tell us if that's familiar to you, and if so, explain what it involves?

A. (Examining document.) Yes, Mrs. Roddy called in and wanted to know when her goods were going to be delivered. They had been picked up two weeks ago in San Diego, and we found that we had no record of Mrs. Roddy's shipment, and knowing that National Transfer & Storage does have an office in San Diego, we contacted the National Transfer & Storage and found that the shipment was coming in on their van.

Q. Here is a memorandum concerning some alleged confusion with a Mrs. J. I. McDaniels in September, 1952. Will you look at that memorandum and tell us what you know about that incident, if you recall it?

A. (Examining document.) Yes, this is for Mrs. McDaniels, who was calling in to cancel an order for moving to San Diego that she had placed, and we checked our records and found that we didn't have any such order, and we called Mrs. McDaniels back, and through questioning her, we found that she was actually trying to get in touch with National Transfer & Storage.

Q. You remember that incident yourself?

A. Yes, I do.

Q. And do you remember what the sequel was, or the ending?

A. Yes, she got in touch with National Transfer

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& Storage. She didn't realize that there was a difference between the two.

Q. In incidents of this kind did you also advise National Transfer about these calls even though you might have told the customer that they were calling the wrong number?

A. Yes, we did. I wouldn't say in all cases.

Q. Was that rather common practice?

A. Yes, it was.

Q. Here is a memorandum dated August 29, 1952, from the San Francisco office. I will ask you to look at that and see if that refreshes your memory on similar incidents, and if so, explain what occurred.

A. (Examining document.) Yes, this is in connection with an order for moving Captain Wild, which was from the Presidio of San Francisco, and he called in, wanting to know when the van was going to be out to pick up his goods, and there again we checked our records and found we had nothing concerning his shipment, and checking with Presidio, we found that the order was being handled by the National Transfer & Storage.

Q. Here is a memorandum dated 8/28/52, regarding a purported inquiry by a Colonel Lightbody. Look at that, please, and tell us what you remember about that, if anything.

A. (Examining document.) Yes, Colonel Lightbody called in and wanted to know when he might

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expect delivery of his shipment which was coming in from Paso Robles. We didn't have any record of such a shipment, and knowing that National Transfer has an office in Paso Robles, or did, we called them and checked with them in connection with the shipment, and found it was being hauled by National Transfer & Storage.

Q. Here is a memorandum dated September 2, 1952, regarding an inquiry of a certain F. C. Arnold. Look at that, please, and tell us what it is, if you know, and explain the circumstances as you may recall them.

A. (Examining document.) Yes, Mr. Arnold called in and wanted to know when we were going to take care of settling his claim, and he gave us the delivery date of his goods, and we checked our records and found that we had nothing for Mr. Arnold.

Q. What kind of a claim was it?

A. It was a damage claim.

Q. That occurred in shipping?

A. In shipping, that's right. And through further discussion and questioning with Mr. Arnold, we found that he had actually been moved by National Transfer & Storage.

Q. Here is a memorandum of September 15, 1952, with respect to a certain complaint of a Mrs. William E. Martin, of Alameda. Look at that and tell us what you know about it, if anything.

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(Deposition of Robert W. Adams.)

A. (Examining document.) Yes, this was from a Mrs. Martin of Alameda. She called in to the office and was quite irate over the moving—the men that had been doing the moving were rude—and the damage that had been done to her furniture in transit from San Diego. She said—she mentioned Mr. Green, and we knew that he worked for National Transfer, and so we referred her to the National Transfer & Storage.

Q. Here is a memorandum of January, 1952, which appears to be about a Stokely Foods incident. Do you recall the incident described in that memorandum?

A. (Examining document.) Yes, I do.

Q. Will you tell us about it, please?

A. Yes. This is in connection with a Mr. Hutto, and he was an employee of Stokely Foods, and the Stokely Foods were paying for his move, and the order had been placed by him through his traffic manager.

Q. The traffic manager of Stokely?

A. Yes, of Stokely Foods, and Stokely Foods' traffic manager told him to get in touch with Mr. Allen of National Van Lines, and Mr. Hutto, who lived in Hayward, called the National Transfer and asked for Mr. Allen, and he was told that Mr. Allen did not work there any longer, and he proceeded to place his order with them. Then, on the day of moving National Transfer's van was late, and——

Q. How did you know it was late?

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A. We knew because he called his traffic manager to complain that the van was not there on the time that had been scheduled for, and——

Q. "He" refers to the man at Stokely?

A. Mr. Hutto called the traffic manager of Stokely, and the traffic manager at Stokely Foods told him to call Mr. Allen, and Mr. Hutto said that Mr. Allen was no longer with National.

Q. Were those facts related to you subsequently?

A. They were, definitely. And the traffic manager told Mr. Hutto that Mr. Allen was with National Van Lines, and gave him Mr. Allen's telephone number, which was, of course, National Van Lines' phone number here in San Francisco, and Mr. Hutto called in, and it was through that telephone call that we got all of this information in connection with the confusion that he had experienced, and through talking with him—he found that he had gone to the wrong company—we found that he'd actually been trying to get in touch with us to place his order.

Q. How do you know that?

A. Well, he'd called National Transfer, thinking it was National Van Lines. He was told that Stokely was paying the bill, and the bill was supposed to come to National Van Lines.

Q. Had National Van Lines worked for Stokely before?

A. Yes, it was an account of National Van Lines.

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Q. Was it a regular account of National Van Lines?

A. Yes, it was. And in any case, Mr. Hutto asked if we could have a van over there, which we checked and found that we could and told him we **would** have one over there within two hours, and he said he was to move with National Van Lines, and he would like to have us come over and pick up his goods as soon as possible, which we did, and he in turn called National Transfer & Storage and cancelled the order with them.

Q. Who had really placed the order for Mr. Hutto; was it the traffic manager of Stokely?

A. The traffic manager of Stokely told Mr. Hutto to contact Mr. Allen. You see, Mr. Allen called on the traffic manager of Stokely frequently and——

Q. Mr. Allen was in your employ, or with National Van Lines? A. That's right.

Mr. Whelan: Now, for this record I want to object to the last answer on the grounds that it's hearsay.

Mr. Groen: Q. Let's proceed, then. Mr. Allen of National Van Lines called upon Stokely, you said, to get these facts straight?

A. That's right.

Q. And that was a common occurrence?

A. That is right.

Q. And National Van had been moving for

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Stokely regularly as one of the regular accounts?

A. That's right.

Mr. Whelan: Let me interrupt. The last answer, the one before this, I want to put in an objection on the ground of hearsay.

Mr. Groen: Q. You, personally, know that National Van had been servicing the account of Stokely? A. Yes, we had.

Q. And you say the traffic manager knew Mr. Allen of National Van Lines?

A. The traffic manager knew Mr. Allen of National Van Lines. In fact, the traffic manager later got in touch with Mr. Allen and confirmed the fact that the shipment was to have gone to National Van Lines.

Mr. Whelan: Objected to on the ground of hearsay.

Mr. Groen: Q. How did—Mr. Hutto, was it?

A. Hutto, yes.

Q. How did Mr. Hutto come finally to get the proper number of Mr. Allen?

A. He got it from the traffic manager at Stokely Foods.

Q. Then, as I understand it, Mr. Hutto placed order for the shipment, himself, on the advice of the traffic manager of Stokely, is that right?

A. That is right.

Q. And he called National Storage instead of National Van? A. That is right.

Q. Is that it? A. That is right.

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Q. And he asked for Mr. Allen at National Storage?

A. Yes, he did. And how it developed was: The traffic manager at Stokely Foods had given Mr. Allen's business card to Mr. Hutto, and Mr. Hutto lost the card. Then he checked in the telephone directory, trying to call to get in touch with Mr. Allen, and he got the National Transfer & Storage people, and they told him that Mr. Allen no longer worked there.

Q. And this was later reported to you by Mr. Hutto?

Mr. Whelan: Wait a minute. On that last answer, I want to put in an objection as to hearsay and make a motion that the answer be stricken.

The Witness: That wouldn't be hearsay, because he told me——

Mr. Whelan: My objection is just for the record, Mr. Adams. If Mr. Groen wants to straighten it out, it's all right.

Mr. Groen: Q. Did Mr. Hutto report that personally to you?

A. Yes, he did, on the telephone.

Q. And you were directly involved in this whole incident, this whole confusion?

A. Yes, I was. I had talked personally to Mr. Hutto.

Q. And Mr. Hutto did report to you about his original contact with National Transfer?

A. That's correct; all of this took place in a

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telephone conversation between myself and Mr. Hutto.

Q. And, as I recall, then, the order was initially given to National Transfer, but when the confusion became apparent, National Van finally got the order?

A. That is right. Mr. Hutto was of the impression that he was being moved by National Van Lines.

Q. Here is a letter to International Harvester from your office, dated January 11, 1952. Will you look at that and explain what that represents, if you know?

A. (Examining document.) Yes, this was for a statement that came in through the mail from International Harvester Company.

Q. Came in to who?

A. Came in to National Van Lines. We checked our purchase order book and found that we had not placed any order with the International Harvester Company, and we returned it to them, and were reasonably certain that it belonged to the National Transfer & Storage.

Q. And did you ever find out where it really did belong, whether it was theirs?

A. No, other than the fact that it was never returned to us after we mailed it back to them.

Q. Here is a copy of a letter to Transport Clearings, San Francisco, from your San Francisco office, purportedly written by you on 3 March 1952.

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(Deposition of Robert W. Adams.)

Will you look at that and explain that, if you are familiar with it?

A. (Examining document.) Yes, this is for an invoice in the amount of \$34.82 which was received from the Transport Clearings at our National Van Lines office. Not having an account with Transport Clearings from San Francisco, we assumed the bill must be National Transfer & Storage's, which I, personally, knew that they did do business with Transport Clearings, and we returned the invoice to them.

Q. You heard nothing from them, I take it?

A. No.

Q. I am handing you a memorandum dated 16 July 1952, which purports to have your name on it, and a letter to National Van Lines from the Post Transportation Officer from Presidio, dated 11 July 1952, and a copy of a letter to the Post Transportation Office, Presidio, from a Mrs. Ellen Shimasaki. Will you look over those three documents referred to and tell me whether or not you are familiar with the matter expressed therein and the incident? Do you remember that?

A. (Examining document.) Yes, this was in connection with a letter that had been written to the Transportation Officer at Presidio by Mrs. Shimasaki involving a claim that she had filed with the National—she says in her letter, "National Van Lines of Oakland," and the Transportation officer at Presidio sent it to National Van Lines' office

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here in San Francisco, and in checking we found that we never moved a Shimasaki to Fort Bragg, North Carolina, or we had no record of that name in our files, and we checked back with the Presidio and found that the order had actually been handled by the National Transfer & Storage in Oakland.

Q. You, personally, checked that material?

A. Yes, I did.

Q. And how was that concluded?

A. The letter was returned to the Presidio, and they in turn sent it to National Transfer & Storage.

Q. Now, in connection with all these memoranda which we have reviewed and to which you have just testified, I notice that some have the name "L. Erspan" and some "Bob Adams," as being the source. Who was L. Erspan?

A. She was general clerk in the office.

Q. Did she work under your jurisdiction?

A. Yes, she did.

Q. Was she a typist? A. Yes, she was.

Q. And whether your name appeared on these memoranda or her own, did you always know about these memoranda?

A. Yes, I did in most cases. We were quite busy, and there were not very many people in the office, and in most cases I made notes on scratch paper, and she later typed them up for me and sent them.

Q. And just transmitted those——

A. That's right.

Q. Were these memoranda prepared in the re-

Plaintiff's Exhibit No. 49—(Continued)

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gular office routine? A. I beg your pardon?

Q. Were these memoranda prepared as a matter of regular office routine at the time?

A. Yes, they were.

Q. And you indicated before that you didn't keep records of all incidents, is that true?

A. That is true. There were many before we started, and even after we started, it wasn't possible to record every one of them. You'd be—being busy, we sometimes wouldn't have the opportunity to get them all on the memo.

Q. How did you handle, say, the average, ordinary inquiry that just came by phone if it could be disposed of readily?

A. Well, if it were apparent at the outset of the conversation that they had contacted the wrong party, we would have them call National Transfer. Those were cases where it wouldn't get involved, and if we didn't get involved, then we merely gave them National Transfer's telephone number.

Q. Now, you indicated that that happened continuously throughout your employ after the agency relationship with National Transfer was terminated? A. Yes, it did.

Q. And do you know whether National Transfer placed advertisements right along with National Van in the telephone directories locally here and other books? A. Yes, they did.

Q. They did? A. They did.

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Q. Did they frequently appear right together, to your knowledge?

A. Yes, in the telephone directory.

Q. Was there anything besides the name "National" that was similar between the two source designations?

A. Yes, they used an outline of the United States with the bottom half in red and white stripes, which is very similar to the National Van Lines' emblem, which carries the same stripe.

Q. And was that emblem containing the red and white stripes that National used similar in appearance to the emblem that National Van used?

A. I would say yes, it was. I think in looking—if you were to glance at the two of them casually, I think you could easily mistake the National Transfer emblem for the National Van Lines', or vice versa.

Q. Now, when reproducing these emblems or names of the respective organizations—that is, National Van and National Transfer—did the alternate red and white stripes come out usually black and white?

A. That's right, in the telephone directory. Of course, in the telephone directory, I think your advertising is mainly for eye catching, and there's where I think a good deal of the confusion came in, because in thumbing through the moving section, a person could easily glance and see these stripes and think, well, that is National Transfer and look at

Plaintiff's Exhibit No. 49—(Continued)

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the telephone number and call it, not being concerned further than that that they weren't actually getting the company they thought they were.

Q. Do you recall whether National Transfer used the emblem with the alternate red and white stripes on their trucks and stationery and advertisements.

A. They used it on their trucks. I believe they used it on their stationery; however, I am not sure.

Mr. Groen: Read back the previous answer that the witness gave, please.

(Answer read by reporter.)

Mr. Groen: Q. Did you mean a National Transfer or National Van there?

Mr. McKee: Which did you mean?

Mr. Whelan: I am going to object if the president of National Van Lines is going to intervene here. I don't think he is a party.

Mr. Groen: He hasn't said anything. I am asking the questions.

Mr. Whelan: But he started——

Mr. Groen: Make a record.

Q. Do you understand the question?

A. No, I don't.

Mr. Groen: Go back where you were reading and read before that again.

(Answer re-read by reporter.)

Mr. Groen: Q. Did you mean National Transfer or National Van there?

A. I meant National Van Lines.

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(Deposition of Robert W. Adams.)

Mr. Groen: I think that's obvious in the record, but I wanted to make certain before we get away.

Q. Now, with respect to all these memoranda which we have been testifying about and the copies of the letters, these are photostatic copies, are they not? A. Yes, they are.

Q. Is there any question in your mind that those are true reproductions of the originals?

A. None whatever.

Q. You have seen the originals?

A. Yes, I have.

Q. They are just copies of letters that were in your possession? A. Yes, sir.

Q. And these are true photostatic copies, as far as you know? A. Yes, they are.

Mr. Groen: The memoranda and copies of letters referred to by the witness, marked "A" through "S", respectively, are offered on behalf of plaintiff as part of the Adams' deposition.

Inter-Office Memorandum "A"

[Stamped]: July 3-52-2:30 p.m.

To L. Hobmann—Chicago. From SF office—L. Erspan. Subject National T/S. Date 7/1/52.

Mr. R. C. Allen of Business Machines, 571 Market St., San Francisco, called this office for Mr. Green. Mr. Green works for National T/S.

Mr. Allen sold some cartons to them sometime ago and wanted to know if they wanted more. We

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)
gave him the telephone number of National T/S.

Inter-Office Memorandum "B"

[Stamped]: July 11-52-2:30 p.m.

To Louis Hobmann—Chicago. From SF office—L. Erspan. Subject National T/S. Date 7/10/52.

We received in the mail this AM a triplicate statement for the above company for 59 fibre drums @ \$1.25 ea—73.75.

We forwarded to National T/S.

[In longhand]: Statement sent to NVL by mistake.

Inter-Office Memorandum "C"

[Stamped]: July 17-52-2:30 p.m.

To L. Hobmann—Chicago. From SF office—L. Erspan. Subject National Transfer & Storage Co. Date 7/16/52.

We received a call today from a Mrs. Reiss regarding the crating and shipment of her household goods for overseas.

The National T/S has the crating contract for overseas shipments.

Inter-Office Memorandum "D"

[Stamped]: June 30-52-10:30 a.m.

To Lou Hobmann—Chicago. From SF office—L. Erspan. Subject National T/S. Date 6/28/52.

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

Mr. F. L. McKee has requested this office to report to you all called that we received at this office that belong to the National T/S in Oakland, Calif. On 6/27/52 we receive two calls directed to them.

1. Bekins Trans. in Oakland called us regarding a claim for P. G. Slattery. The lot was in storage @ National T/S. having gone into their whse. on 2/25/52 and evidently delivered to residence on 6/26/52 by Bekins.

2. Call received by this office for an employee by the name of Mr. Rodney. This man is an employee of National T/S.

Inter-Office Memorandum "E"

[Stamped]: Mar. 5-52-2:30 p.m.

To Lou Hobmann—Chicago.

Camp Stoneman called regarding a shipment of goods from Ft. Dix, N. J. for Sgt Ben Gersatones. In checking the information it was necessary to Teletype Los Angeles and call Camp Stoneman back. This cost us about \$2.00 in communications cost. It was learned that the shipment was coming in via Howard Van Lines, for whom National Transfer and Storage are Agents.

We had a call from a lady called for John Hatton, National Transfer & Storage. This lady knew the company she was calling, but because of the similarity of names did not notice the difference.

On February 12th, a Mrs. Jarvis wanted to know

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

when the truck would arrive to pick up her goods. This we learned was a Presidio Order and was intended for National T/S.

Do not know of what value this information will be, as there is not too much detail.

Bob Adams

CC: File L. Hobman

Inter-Office Memorandum "F"

[Stamped]: Mar. 5-52-2:30 p.m.

To Lou Hobbman. From San Francisco. Subject National Transfer & Storage Co. Date 3 March 1952. San Diego, Calif.

Reference: Further information regarding subject Company, your Memo 12-27-51.

In the past few weeks, confusion between the names of National Van Lines and National Transfer and Storage has developed as follows:

Mr. Buckley inquiring about his goods coming from St. Paul, Minn. It was later learned his call was meant for National Transfer & Storage Co.

A lady called for Mr. Green. It was learned that Mr. Green was the dispatcher. We happen to know that Mr. Green works for National Tfr & Storage and does some of the dispatching. We therefore referred the lady to National Transfer.

A Mrs. Higbee, called wanting to know when drivers would be at her residence to load her furni-

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

ture on January 16th. In checking our records we found that no such shipment was to load on the 16th or any other time. We called National T/S and they advised that this shipment was on their records.

Attached is a letter which is self-explanatory:

Inter-Office Memorandum "G"

[Stamped]: Aug. 25-52-10:30 a.m.

To L. Hobmann—Chicago. From SF office—L. Erspan. Subject National Transfer & Storage. Date 8/22/52.

Mrs. J. W. Roddy requested information as to the arrival of her goods from San Diego to Oakland. Goods were picked-up two weeks ago.

She extended the courtesy of calling this office to advise us that National T/S were handling her shipment.

Her phone number: Andover 1-3696.

Inter-Office Memorandum "H"

[Stamped]: Sept. 26-52-2:30 p.m.

To L. Hobmann—Chicago. From R. W. Adams. Subject N.V.L.-Nat'l. Trsfr. & Strg. Date 23 Sept. 52.

This morning our Oakland Office called and advised that a Mrs. J. I. McDaniels, of 396 11th Avenue, San Francisco, California (Ph: SKyline

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

2-1384) had called to cancell her order for moving to San Diego, California.

In checking we found that we did not have any such order. We called Mrs. McDaniels and found that she was actually trying to contact National Trsfr. & Strg. to have her order cancelled. She was confused between the two names, in fact she did not realize that there was a difference.

Bob Adams

Dist: cc: Eile (L. Hobmann)

Inter-Office Memorandum "I"

[Stamped]: Aug. 29-52-2:30 p.m.

To L. Hobmann—Chicago. From SF office—L. Erspan. Subject National T/S. Date 8/28/52.

On 8/27/52 we rec'd a call that should have gone to Mr. Green of Nat'l TS regarding that company purchasing the Yates V/L.

On 8/28/52 we rec'd a call from Capt. Wild whose shipment of household goods is being shipped by Nat'l. T/S. Order was given to them by Presidio of San Francisco. Capt. Wild wanted to know when he could expect the truck for the pick-up.

[In longhand]: 8/26—Call regarding delivery of lift van from overseas. National T/S has crating and uncrating contract.—B. Tracy.

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)
Inter-Office Memorandum "J"

[Stamped]: Aug. 29-52-2:30 p.m.

To L. Hobmann—Chicago. From SF office—L. Erspan. Subject National T/S. Date 8/28/52.

Col. Lightbody was inquiring about when he might expect delivery on his shipment of furniture from Paso Robles, Calif. to 2361 Fruitvale Ave., Apt. 11, Oakland, Calif.

This shipment is being hauled by Nat'l T/S. They have an office in Paso Robles.

Inter-Office Memorandum "K"

[Stamped]: Sep. 3-52-2:30 p.m.

To L. Hobmann—Chicago. From SF office—L. Erspan. Subject National T/S. Date 9/2/52.

Received a call this AM from a Mr. F. C. Arnold of Iganico, Calif. wanting to know when we were going to take care of the settlement of his claim. His goods were delivered on 8/6/52.

After checking our files and further discussion with Mr. Arnold we learned that this shipment was handled by National T/S.

Inter-Office Memorandum "L"

[Stamped]: Sep. 16-52-2:30 p.m.

To L. Hobmann—Chicago. From SF office—L. Erspan. Subject National T/S. Date 9/15/52.

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

Rec'd a call this afternoon from Mrs. Wm. E. Martin of Alameda, Calif. Phone: Lakehurst 3-5831 regarding missing items, damage to her goods and the undesirable behaviour of the 3 men who delivered her goods. This shipment came from San Diego. Shipment was delivered 9/13/52.

She wanted to speak to Mr. Green. He works for National T/S.

Inter-Office Memorandum "M"

To L. Hobmann—Chicago. From R. W. Adams—
San Francisco. Subject Trade Name Infringements. Date 17 January 1952.

B/L 58028—T. H. Hutto, Hayward, Calif. to
Salisbury, Md.

The above order, indirectly, came from Stokely Foods. Mr. Hutto was leaving the employ of Stokely Foods and the Traffic Mgr. gave Mr. Allen's card to Mr. Hutto and told him to call us for his moving services.

Mr. Hutto lost the card and so when calling he consulted the Telephone Directory and of course got the National Transfer & Storage instead of this office. National T/S told him that Mr. Allen no longer worked for them and took his order, Mr. Hutto being under the impression that he was dealing with National Van Lines, Inc.

When the loading date came, Nat'l T/S van did not show up on time, so Mr. Hutto called the Traffic

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Mgr. of Stokely Foods and advised him. The Traffic Mgr. told him to call Mr. Allen, but of course Mr. Hutto said Mr. Allen did not work for us. The Traffic Mgr. said that he did and gave Mr. Hutto this office's phone number. Mr. Hutto called wanting to know where the van was to load his goods. This was the first we knew of such an order. Through conversation we came to realize what had taken place and explained same to Mr. Hutto. He asked if we could get a van over S.A.P. and we told him it would be there within two hours. He called and told Nat'l. Trsfr. to cancel their order. If Nat'l. Trsfr's. van had not been late we would not have gotten the order and Mr. Hutto would have thought he was still dealing with N.V.L.

Bob Adams

Dist: cc: Mr. F. L. McKee cc: File (58028)

Inter-Office Memorandum "N"

[Printer's Note]: Inter-Office Memorandum "N" is a duplicate of Inter-Office Memorandum "M".

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

“O”

[Stamped]: Mar. 5-52-2:30 p.m.

San Francisco, Calif., January 11, 1952

International Harvester Company,
Motor Truck Division
2855 Cypress St., Oakland, Calif.

Dear Sirs:

We are returning the attached statement, since we are of the opinion that this statement belongs to the National Transfer & Storage Co. of Oakland.

Our last Purchase order to you was No. 555 issued on 10-8-51 for a Transmission seal in the amount of 8.20 which was paid by our Chicago office, Check No. 7779 on 11/13/51.

Our records do not indicate we have placed any order for services with you during the month of December. However, if you will render an invoice giving us the drivers name, tractor and trailer number, etc., we will be able to check thoroughly.

Thanking you in advance we remain.

Yours very truly,

National Van Lines, Inc.
LaVern Erspan

Encl: Statement 1004.

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

“P”

[National Van Lines, Inc. Letterhead]

[Stamped]: Mar. 5-52-2:30 p.m. (Copy)

3 March 1952 San Francisco Office

Transport Clearings

150 California Street, San Francisco 11, Calif.

Gentlemen:

Enclosed please find invoice in the amount of \$34.82 which is parked past due. We wish to advise that to our knowledge, we have no account with you. It is our opinion that your invoice is intended for National Transfer and Storage Company in Oakland. The names are very similar and often confused.

Very truly yours,

National Van Lines, Inc.

R. W. Adams

RWA:t cc L. Hobman File

Inter-Office Memorandum “Q”

[Stamped]: July 17-52-2:30 p.m.

To L. Hobmann—Chgo. From R. W. Adams—S. F.

Subject Nat'l. Trsfr. & Strg. Date 16 July 1952.

Attached are photostats of letters received by Transportation Officer at Presidio of San Francisco from Shipper confusing Nat'l. Trsfr. & Strg. with National Van Lines, Inc., also photostat of letter from Transportation Officer.

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

The shipment in reference was not handled by National Lines, Inc., but by National Transfer & Storage of Oakland as agent for Howard Van Lines.

Hope this will be of use to you.

Bob Adams

Dist: cc: File (L. Hobmann) cc: F. L. McKee—
Los Angeles

“R”

Headquarters, Presidio of San Francisco, Calif.

Office of the Post Transportation Officer

AMNPR—TO 552.02

11 July 1952

National Van Lines

540 Turk Street, San Francisco, Calif.

Gentlemen:

Inclosed is copy of letter from Mrs. Ellen Shimasaki regarding personal effects which were not delivered to her on move of household goods from San Francisco, Calif. to Fort Bragg, N. C.

Request that you investigate this and advise Mrs. Shimasaki at an early date with copy of your reply to this office.

Sincerely yours,

/s/ Roger H. Brown

For W. P. Schopper, Lt. Col., TC, Post Transportation Officer.

1 Incl. Cy ltr

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

“S”

(Copy)

June 18, 1952

1746 Geary St., San Francisco, Calif.

Post Transportation Office
Building 86, Presidio, San Francisco, California
Attention: R. H. Brown

Dear Mr. Brown:

When my husband, 2nd Lt. Fred F. Shimasaki 02211903 MSC was ordered to Fort Bragg, North Carolina, we had our household goods moved by the National Van Lines of Oakland through an army contract.

The movers came to do the packing on January 4, 1952. When the movers had finished their job, we noted that some hats (about 8 or 10) were still not packed. Since the men had run out of boxes, they loaded these on the truck and promised to pack them in a box after they had reached the warehouse. Hence these hats were not listed on their inventory sheet.

We have written to the company, but they claim that nothing can be done about the claim since it was not listed on the inventory sheet. We paid \$6.00 to have our goods insured for \$1000.00 and I am sure the drivers of the truck who did the packing for us could verify my story.

My husband being in Korea, he is unable to do anything about the matter and I would appreciate

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

any help you could give me. I may be reached at my work from 8-5 Monday thru Friday at We 1-8000 Extension 72.

Sincerely,

/s/ Ellen Shimasaki

A True Copy: Signed Roger H. Brown, CTA.

You may cross-examine.

Cross Examination

Mr. Whelan: Q. Mr. Adams, how old are you?

A. 29.

Q. And I believe you have testified that you are now the claim adjuster for Bekins Van & Storage Company?

A. Will you please repeat that?

Q. I say you are now the claims adjuster for the Bekins Van & Storage Company?

A. Not the claims adjuster; I am a claims adjuster, yes.

Q. And you have been with them approximately nine months? A. Yes; September 3, 1953.

Q. And how long were you with this Peters & Sons?

A. Peters & Sons. Oh, I'd say two months.

Q. And what was your capacity with them?

A. Actually, I worked as part-time sales to fill in while I was looking for work.

Q. And are you a San Francisco resident?

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

A. Yes, I am.

Q. How long have you lived here?

A. I have lived here since March of 1949.

Q. And you first went to work for the National Van Lines in what year? A. 1948.

Q. And, as I understand your testimony, you were first a billing clerk for them?

A. That is correct.

Q. In Los Angeles? A. That's right.

Q. And how long did you have that job?

A. I'd say six months.

Q. And your next job with them was dispatching? A. That's right.

Q. Here in San Francisco? A. Yes.

Q. How long did you have that job?

A. I'd say for a year.

Q. And then you became office manager, is that right? A. Yes.

Q. How long were you office manager?

A. Well, I think in an office of that size—

Q. No, just answer my question. I want to know how long you were office manager, approximately.

(No response.)

Q. You are hesitating, Mr. Adams?

A. I am merely trying to get it straight in my mind. As a matter of fact, the office manager and dispatch would have been together.

Q. I see. A. At the same time.

Q. So that was for approximately a year?

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

A. Yes, from '49—March, '49, to approximately February, 1950.

Q. And, then, thereafter was when you became district manager for the San Francisco bay area, is that right? A. That's right.

Q. And how long were you district manager?

A. Up until May of 1953.

Q. Now, I believe you have testified that during the time you were in the San Francisco office, from March of '49 until the time you left in March of '53, the number of your employees varied between five and six, is that right? A. That's right.

Q. Did you have much of a turnover in personnel? A. No.

Q. In other words, the people who were there in '49 were the same when you left in '53?

A. No, the five and six were in late '49 and perhaps the first part of '50, and from '50 on I don't think the personnel was over more than four within the office, itself.

Q. I see. Starting about January 1, 1952, will you tell me the names of the employees of National Van Lines that were under you in this district office? A. In January, 1952?

Q. That's right.

A. There was a Burt Tooey.

Q. What was his job?

A. He was dispatching and was in charge of the office.

Q. Yes. A. That is——

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Q. He was the man that had replaced you?

A. I beg your pardon?

Q. He was the man that took your job?

A. No, I left——

Q. I mean as you moved up?

A. That's right.

Q. All right. The names of the others, if you recall?

A. In January, the first part of '52, I believe it was just myself, Mr. Tooley, and a girl that I can't remember her last name. Her first name was Rae. I can't remember the last name.

Q. At the time that you left in '53, what were the names of the employees who were at that time under you? A. Mr. Allen.

Q. What was his job?

A. He was a salesman. And Miss Erspan and Mr. Knickerbocker, and that was all.

Q. In other words, there were only three employees then under you?

A. Counting myself——

Q. Four, counting yourself?

A. Three under me, yes.

Q. Then, there's a variance with your testimony on direct examination that the number of employees was between five and six, or would you explain that?

A. I was asked the question: What were the number of employees during the time you were in the San Francisco office, and at the time I came here in '49, there were two when I first started, and

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

then we increased our force up to either five or six. We had a man working on claims, who—that man also worked on sales—and we had another salesman. We had a Mr. Richardson.

Q. When was that? A. This was in '49.

Q. '49?

A. What I am trying to do is tell you when the five and six were there.

Q. I see. In other words, when you said it varied between five and six, what you meant was it varied between two and five from the time you came into the San Francisco office, a minimum of two and a maximum of probably six, is that right?

A. I'd say a minimum of three.

Q. All right.

A. And a maximum of six, yes.

Q. Now, where was the National Van Lines located in San Francisco in February of 1950?

A. In February of 1950 it was located at 607 Market Street.

Q. And thereafter did the address of National Van Lines change at any time?

A. Yes, we moved to 540 Turk Street.

Q. And is that the present address?

A. No, the offices were closed in May of '53, and there is now in use an agency in place of the National office which represents National Van Lines here in San Francisco, and what their address is I am not sure.

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Q. National Van Lines no longer has an office here in San Francisco?

A. It no longer has a regional office, no.

Q. Let me ask you this question: Does it have an office here, without any reference to agents?

A. No.

Q. Now, what was the telephone number of the National Van Lines from the time you joined the San Francisco office in '49 up until the time you left them in February or March of 1953?

A. That I cannot answer.

Q. All right. Was that telephone number ever changed? A. From March—

Q. No, from 1949 up to the time you left in 1953, a four-year period? A. Yes, it did.

Q. How many times did the phone number change, from your recollection? A. Twice.

Q. Twice. Did the National Transfer & Storage Company, the defendant in this action, have an office in San Francisco between the period of 1949 and the period that you left National Van Lines, Inc., in February of 1953?

A. I left them in May.

Q. Pardon me. May. I am sorry if I am misstating your—

A. No, they had their offices in Oakland.

Q. Did they have the same telephone number as the National Van Lines office here in San Francisco?

A. Did they have the same telephone number?

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Q. That's right. A. I don't think—no.

Q. Do you know where the National Transfer & Storage Company's office was located in Oakland after February of 1950?

A. It was located, I believe, in the section which is called Emeryville. I don't know the exact street. Maybe San Pablo.

Q. Do you know their address?

A. No, I do not. I did at that time. Is that what you mean?

Q. I want to know if you know now.

A. No, I don't recall it now.

Q. When, Mr. Adams, would you say the confusion here started, from your recollection, with regard to National Van Lines, Inc., and National Transfer & Storage Company concerning calls that were either for one or the other company, approximately?

A. I think in—it was always there; however, when they were an agent, the principal wouldn't push the agent on things such as that and cause friction.

Q. Well, let me ask——

A. But we didn't notice the confusion, actually, in the volume that it was in, until after we no longer had an agency working agreement with National Transfer & Storage.

Q. When was that?

A. That I believe was in February of 1950.

Q. And at that time you were still the office

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

manager, or had you become the district manager?

A. It was just changing.

Q. Just changing. At National Van Lines after you became district manager up until the time you left National Van Lines in May of 1953, did you have a girl or an operator to handle telephone calls?

A. Yes, we did.

Q. And was a record kept of the number of incoming phone calls each day? A. No.

Q. In other words, if I understand your testimony, unlike other offices which keep records of incoming calls, no record was kept?

Mr. Groen: I object to a question of assumption like that, that other offices all keep incoming calls.

The Witness: Well, I was about to say no——

Mr. Whelan: Let me strike that. You may be right, Mr. Groen.

The Witness: No, because Bekins doesn't do that.

Mr. Whelan: Off the record.

(Unreported discussion.)

Mr. Whelan: Back on the record.

Q. Mr. Adams, as I understand your testimony, no record was kept, from your knowledge, of incoming calls after you became district manager until the time you left, and probably no record of incoming calls was kept prior to the time that you became district manager back to at least 1949, is that correct?

A. That is correct. It would require the full time of one person just to record those calls.

Q. I see. A. Aside from answering.

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

Q. Now, that's the next question. After you became district manager in 1950, about February of '50, can you tell me from your recollection what was the number of incoming calls per day?

A. I would say it varied between 200 and 300, depending on the——

Q. How many calls would you, yourself, personally take after that period of time? In other words, I am referring now to February of '50 up until the time that you left in May of '53.

(No response.)

Q. Just approximately.

A. I'd say 125; so many that at times I was busy——

Q. In other words, you had a busy office; you were handling an average—is this a fair statement—of between 100 and maybe 150 phone calls a day?

A. Yes.

Q. Incoming. Does that include in your number the number of calls that you might put out in the course of business for National Van Lines, or would that be another figure?

A. I would say that would be another figure.

Q. What would that figure be, approximately, for this period, now, of between February of 1950 and May of 1953 when you left National Van Lines?

A. Now, there again you are asking me something which you are giving a definite period, and

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

there are times in that period which were very peak points.

Q. All right.

A. And I am giving you those peak points, not the points when business would lull, which is——

Q. I understand that.

A. ——traditional yearly in transportation.

Q. That's what I wanted to clear up, because I was going to come to that. In other words, then, the figure you have given us was a peak period?

A. It was.

Q. All right. Now, tell me this, Mr. Adams: From your experience as district manager between February of '50 and May of 1953, can you tell us just about what your peak periods covered during a year? Is there any way to break that down?

A. Well, they vary. I am sure that the—there are records in Chicago——

Q. Well, from your knowledge, now. This is just from your recollection, because you mentioned here that the figure of 100 to 150 phone calls incoming that you personally received was a peak figure. That is a figure for calls at a time when you were really rushed, but didn't represent times when you wouldn't be.

A. That's right. There'd be—in the summer months we are busy.

Q. That would be, then, somewhere between the 1st of June and the last part of September; would that be a fair statement?

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

A. Yes, that's right.

Q. Now, when you became district manager of National Van Lines, Inc., in February of 1950, approximately, who was the manager or the head of the National Transfer & Storage Company in Oakland at that time? A. Mr. Renner.

Q. Renner. Would you spell that?

A. R-e-n-n-e-r.

Q. And do you know how long he continued as manager, from your own recollection?

A. I'd say about two, maybe three, months. I couldn't be sure.

Q. And who thereafter became manager over there? A. Mr. Green.

Q. Mr. Green? A. Mr. Green.

Q. And how long did Mr. Green continue as manager of the National Transfer & Storage Company, from your recollection?

A. To my knowledge, right up till the time I left National Van Lines.

Q. In other words, he was there up until at least May of 1953, and possibly continued?

A. Yes, he still may be there.

Q. Prior to testifying here today, Mr. Adams, when was the last time that you saw these inter-office memoranda which have been offered here with the deposition?

A. Well, now, that would be—they were in our files—copies of them were in our files when the office was closed in 1953, in May.

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Q. I see. So that the last time, then, that you saw the copy of which this is a photostat (indicating), or these are photostats, was in May of 1953?

A. Yes.

Q. Approximately thirteen months ago?

A. That's right.

Q. Have you discussed this case at all with any one since May of 1953 prior to testifying here this morning? A. No.

Q. After the action was commenced in this case in November of 1952, in between that period and May of 1953, was there any discussion of this case with any individual? A. No.

Q. Were these office memoranda that have been introduced by Mr. Groen along with the deposition ever discussed between November of 1952 and May of 1953? A. No.

Q. Was there any discussion of these interoffice memoranda with any one prior to November of 1952? By "these office memoranda," I am referring to the exhibits here that are marked, I believe, "A" to "S", and I am also including the several letters that I believe you were shown earlier.

A. Would you ask that again, please?

Mr. Whelan: Would you repeat the question, Mr. Reporter?

(Question read by reporter.)

Mr. Whelan: Q. And testified to?

A. Beg pardon?

Q. I am adding to that, "and testified to."

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

A. That's a difficult question to answer, in that they would have been discussed at the time that these events took place which are on those memoranda, and once they were written and put into the file, I haven't seen them since.

Q. In other words, that's what I wanted to find out. Was that ever discussed—these interoffice memoranda—with Mr. Groen at all? A. No.

Q. Prior to November of '52? A. No.

Q. And aside from the discussions that you mentioned in your direct examination by Mr. Groen, that was the only discussion that was had on these memoranda with the particular individuals that might be involved? A. That's right.

Q. So that your testimony here today is based upon your recollection of incidents that occurred from a period of approximately January of 1952 until the time you left in May of 1953, is that correct? A. That is correct.

Q. And your recollection at no time prior to testifying here today has been refreshed by the seeing of these interoffice memoranda or reading any part of them prior to testifying? A. No.

Mr. Groen: I think, if I may interject here—do you understand these questions as prior to testifying, or are you thinking of today? We did discuss them this morning. I want the record to show that.

Did you understand that question?

The Witness: No, I didn't. I have seen them today and prior to——

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

Mr. Whelan: That's what I am going to come down to.

Mr. Groen: I didn't want—

Mr. Whelan: Q. I gather that you have seen—

Mr. Groen: We discussed them this morning.

Mr. Whelan: Q. (Continuing:) —these inter-office memoranda this morning before you testified?

A. Yes.

Q. I was referring to before today?

Mr. Groen: All right. I just wanted to make that clear.

The Witness: You meant before today?

Mr. Whelan: Q. That's right. A. No.

Q. In other words, the first time that you saw them between the time that they were put into your office files was this morning?

A. That's right.

Q. And at that time you discussed them with Mr. Groen before testifying here today?

A. That's right, yes.

Q. Now, Mr. Adams, with reference to the interoffice memoranda, I would like you to be a little patient with me. I am referring to the first one here that is marked with an "A", and it has on it the date July 1, 1952. Will you explain to me what this stamp, "July 3, '52—2:30 p.m.," means?

A. Yes, that is the date that the original would have been received in the Chicago office.

Q. I see. And in this memorandum it refers to a call by a Mr. R. C. Allen of Business Machines.

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Did you personally talk to Mr. Allen on this particular matter concerning the cartons that had been sold sometime before, and that he wanted to know if they could secure some more?

A. Yes, I think I did.

Q. Do you recall about what time of the day that call came in?

A. I think it was in the morning.

Q. And you mentioned in your direct examination that you made notes, and then later turned them over to the secretary for typing up, which were made into these forms of interoffice memoranda?

A. That's right.

Q. What did you do with your notes?

A. I imagine after she had typed them up, she'd—they were pieces of regular scratch pads, and they'd be discarded.

Q. They'd be discarded. Now, with regard to "B," which is a triplicate statement from whom?

A. Apparently we didn't record that.

Q. So that you don't know from which company this triplicate statement for 59 fibre drums at such and such an amount, total \$73.75, was from?

A. No, I don't.

Q. Now, with regard to "C" memorandum, which is a call from Mrs. Reiss, it's under the date of July 16, 1952. Would these office memoranda be typed up the same day as you received a call, or would it be routine to possibly type it up a day or so later?

A. Well, in some cases they might have been

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

typed up a day later, and in many cases they were typed the same day.

Q. The same day. Would this "L. Erspan" always be the typist if her name is on the top?

A. Yes.

Q. "SF office—L. Erspan"?

A. That's right.

Q. Did you, personally, talk to Mrs. Reiss on this call concerning the crating and shipment of her goods for overseas?

A. Yes, I believe so. I think Mrs. Reiss was from across the bay.

Q. And you then checked with the National Transfer & Storage Company in order to find out if they had the contract for that?

A. No, I know that they do—did have the contract.

Q. You didn't check with them to find out whether they did or did not?

A. I didn't think it was necessary, because all of the movers in the area had placed bids for the packing and crating contract, and it had been published by the government who was awarded the contract.

Q. When had this contract been awarded, do you know, to the National Transfer & Storage Company?

A. For that year. I would say the definite period I do not know. The definite date I do not know, either.

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

Q. In other words, it was at least for the year 1952?

A. Yes. In other words, since then I have—at that time I am sure I knew. There is knowledge, working knowledge, that you have in particular jobs that you have, and when you leave and go onto another job, that working knowledge necessarily is replaced with other working knowledge, is gone. You don't remember, and I don't recall—

Q. You would concede, Mr. Adams, that a working knowledge might not necessarily be correct, is that right? A. No, I wouldn't say so.

Q. In other words, what you are saying is that your working knowledge in all respects was true and correct?

A. Are you referring to the contract?

Q. No, I am talking generally now, because you were talking generally.

A. Well, I think the answer there has to be that a working knowledge cannot always be correct. I mean otherwise no one is ever incorrect.

Q. Now, with regard to—

A. Or not incorrect.

Q. —this government contract which was for handling overseas shipments of household goods, did National Van Lines ever have that contract during the time that you were district manager?

A. No.

Q. Did any other company other than National

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Transfer & Storage Company have that contract?

If you don't know, say so.

A. During what period?

Q. From the period that you became district manager until the time you left in May of 1953.

A. Yes, I believe there were others.

Q. There were others. Could you give me the names?

A. It is a contract that's awarded yearly, and sometimes they change and make it every six months.

Q. Could you give me the names of some of those other companies that had this overseas contract with the United States Government?

A. Yes. I don't know what the name of the company would be in this case that actually had the contract, because the company has two or possibly three different names. One is Dick's Van & Storage, and Federal Van & Storage. Which of those had the contract I don't know.

Q. Did Bekins Van & Storage ever have it during that period of time you were district manager?

A. Did Bekins?

Q. That's right, from your knowledge.

A. From my knowledge, they did not have the particular contract that we are referring to, no.

Q. During the time you were district manager, from February of 1950 to May of 1953, did you ever receive calls from people who had made a mistake and thought that the National Van Lines had

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

the shipment of their goods, and it turned out that National Van Lines did not have it?

A. Did I ever receive a call from people who made a mistake——

Q. That's right.

A. ——in calling for——

Q. In other words, in calling National Van Lines to find out if they had the shipment of goods, and it turned out National Van Lines did not, other than your testimony here with regard to National Transfer & Storage?

A. In other words, did we ever have people call us for shipments we did not have?

Q. Correct.

A. Other than for this confusion business, no.

Q. No office memorandum was ever made on any other company?

A. Not to my knowledge, no.

Q. During the time you were there?

A. Not to my knowledge.

Q. Do you know if National Transfer & Storage Company had an ad in the San Francisco telephone book from February of 1950 until May of 1953?

A. I am not sure about the first part of '50, but they did, during the period that you are referring to, run an ad in the San Francisco telephone book.

Q. Do you know whether that was one of these large ads that takes up part of a page?

A. I think it was a quarter-page ad.

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Q. A quarter-page ad. It set forth their place of business, from your recollection, and their telephone number? A. I believe it did.

Q. Was it on the same page, as you recall, as National Van Lines, Inc.'s ad?

A. I don't believe it was on the exact same page. It may have been on a facing page.

Q. You remember on memorandum "D", which is the call from the Bekins Transportation Company in Oakland concerning a claim of P. G. Slatery, who it was that you talked to in the Bekins' office in Oakland? A. No, I do not.

Q. Do you remember the approximate date of the call? The memorandum, to refresh your memory, is dated June 28, '52, and I was wondering if that call came on that date or possibly a day or so earlier.

A. I believe that was possibly a day or so earlier. In fact, I think that particular one was held and typed up later, yes.

Q. Since that memorandum was made, on or about June 28, 1952, until this morning when you discussed it with Mr. Groen, it was the first time that you had viewed that memorandum, correct?

A. That's correct.

Q. And that's a period of approximately two years, is that correct? A. Correct.

Q. On memorandum "E", which is the Camp Stoneman call, in examining this memorandum, I see no date on it, but I notice that it's stamped

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

“March 5, 52—2:30 p.m.”, which, as I recall your previous testimony on another memorandum, would be the date it was received in your Chicago office, is that correct? A. That is correct.

Q. And it would take approximately two days to transmit it to Chicago?

A. One or two days.

Q. One or two days. So this memorandum, then, was probably typed up somewhere about the 1st of March of 1952?

A. I believe it's safe to say so, yes.

Q. Do you recall who you discussed the shipment of goods of Sergeant Ben Gersatness with at Camp Stoneman? A. No, I wouldn't.

Q. And——

A. In discussions with people in offices such as that, you——

Q. You just made the notation on your scrap note? A. That's right.

Q. The notes you were making that it was from Camp Stoneman? A. That's right.

Q. And until this morning when you discussed it with Mr. Groen, it was the first time that you have seen this since it was transmitted to Chicago in March of 1952?

A. Well, now, on all of these, I can't say that this is the first time since the date of those memoranda, because, as I said, in May of 1953 we still had them in my office, and I did make it a practice to check our files. I imagine up to that date I prob-

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

ably had these memos out and reviewed them, yes, in May of 1953.

Q. Do you know that you did review this particular memorandum in May of 1953 before leaving National Van Lines?

A. No, I don't know that I did that particular one in May; no.

Q. I see. Would you recall prior to May, 1953, and after March 5th of 1952 whether or not you did look at this particular memorandum again concerning the Camp Stoneman—

A. Would I recall the date?

Q. No, whether you did look.

A. I recall that I have looked at the file containing all of those memoranda, yes.

Q. But whether you looked at this particular one, Mr. Adams—do you know that or not—between March 5th and May of 1953?

A. I think I did, yes.

Q. You recall when?

A. I think I asked you just before if you meant the particular date that I did, and I said I didn't know the particular date.

Q. Well, do you recall the approximate month?

A. Oh, I would say January, February, 1953.

Q. Why? A. Pardon?

Q. Why did you look at this particular memorandum at that particular time in January or February of 1953?

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

A. I think you are getting down—you are——

Q. Just answer my questions.

A. Why? In order to explain why, there was no direct reference to this particular memorandum, no, in looking, but I happened to be in the file, and thumbing through, reviewing these, and I do recall having seen that one in the file at that time.

Q. With regard to the memorandum which is marked "F", which is dated March 3, 1952, it has reference to a lady calling for Mr. Green. Mr. Green, as I understand your testimony, was the dispatcher for the National Transfer & Storage Company?

A. That's right, he did a certain amount of dispatching for them. He might have been their office manager at that particular time. What his exact official title on the payrolls was, I do not know, but I do know that many times I talked with him in connection with dispatch of shipments and that sort of thing.

Q. Yes.

A. I would be under the impression that he would be the one that she was referring to, since there is only one Mr. Green that I know of in the transportation business in the bay area at that particular time, and the fact that she mentioned "dispatcher," I would be thoroughly convinced that she meant Mr. Green of National Transfer & Storage.

Q. This memorandum "F" refers to two calls. Were there two calls here, one from an unknown

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

lady and the other from a Mrs. Higbee, or was it both the same?

A. There were two calls.

Q. Two calls. And you didn't inquire of the lady who called for Mr. Green what she wanted?

A. No. If a person calls in, oftentimes not for a particular person, and you explain that person isn't there, you wouldn't inquire further.

Q. That's what I mean. You don't know on that particular call whether it was personal or social or what? A. No.

Q. The only one you know that was of a business type was this second call from Mrs. Higbee, correct?

A. I don't understand your question. The only one—

Q. I mean there's only two calls here.

A. Oh.

Q. I am referring now to this memorandum (indicating). A. Oh.

Q. Now, did you talk to Mrs. Higbee on this particular occasion?

A. Would you refresh my memory?

Q. The date of it is March the 3rd, 1952, and I am referring to this last paragraph.

A. (Examining document.) Yes, I did.

Q. Do you remember, Mr. Adams, what time of the day—by that I am referring to the morning or the afternoon—that this particular call came in?

A. I believe it was shortly before lunch.

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Q. Then, there's a notation on this, "We called National T/S", which refers to National Transfer & Storage Company, is that correct?

A. That's correct.

Q. Who called? A. I called.

Q. And who did you speak to?

A. I spoke with Mr. Green. In fact, I spoke with some girl in the office who answered the telephone and got Mr. Green for me.

Q. This memorandum, as distinguished from some of the other interoffice memoranda that have been introduced here along with your deposition at the close of the direct examination, does not have your name at the bottom of it, is that correct?

A. That's correct.

Q. Now, what I'd like to find out, Mr. Adams, is this: When the word "we" is used, what does that mean? I mean I am just trying to find out.

A. I think it means what any persons in any company mean when they say "we" in reference to this: We as a group, we as a company, we who cooperate or who are together in an office.

Q. In other words, it was not your practice in the inter-office memoranda to make the mention that "I" phoned? A. No, no.

Q. Or that "X" phoned?

A. No. You, perhaps—if I were writing directly to an individual, then I would use the word "I". In writing to a file, which in effect was our impression in doing this, we were putting it—keeping a

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

file, creating a file, and those who were reading it would use that tense, or the word "we".

Q. These interoffice memoranda was being forwarded to your Chicago office; is that correct?

A. That's correct.

Q. To an individual in that office?

A. Who was keeping the file, that's correct.

Q. And in these interoffice memoranda like this one of March the 3rd, '52, which I have just been discussing, there would be no way for the man receiving it in Chicago—on this one it mentions Lou Hobbman, I believe—to know who actually did this work?

A. That's correct, apparently, in this particular case.

Q. Now, on memorandum "Q", which is also addressed to Mr. Hobmann, in Chicago, and refers to the request of Mrs. J. W. Roddy with regard to her goods arriving from San Diego to Oakland, I'd like to ask you this question: What was Mr. Hobmann's capacity with the National Van Lines?

A. At that particular time?

Q. That's right; this is dated August 22, 1952.

A. 1952. I believe he was sales manager. I am not sure.

Q. Sales manager. Is your Chicago office the head office for the National Van Lines?

A. That is right.

Q. Do they have a district manager there, too, like you have the same capacity here?

Plaintiff's Exhibit No. 49—(Continued)
(Deposition of Robert W. Adams.)

A. Well, that—never having been to the Chicago office, I don't think they have—

Mr. Groen: Off the record.

(Unreported discussion.)

Mr. Whelan: I think that I should have the right to cross-examine at length, and I was under the impression when I came up here for this deposition this afternoon that we, frankly, wouldn't have the amount of exhibits that have been put in, because to intelligently cross-examine on them takes a little time.

Mr. Groen: But they are all of the same character.

Mr. Whelan: That is what—I was going to save time on this next point.

Mr. Groen: They are all directed at the same point, so if there are two or two hundred, it's all the same.

Mr. Whelan: My point is I have the right to test this witness' recollection, and, for example, this man Mr. Hobmann is named on "A" to "G"—on every memorandum, and I think I should know what his rating is.

Mr. Groen: All right, he's manager of the Chicago office, I believe. Mr. McKee will testify to that eventually.

Mr. Whelan: I want to know if the witness knew that, see.

The Witness: I think if you will go back, you

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

will find—at this particular date, I don't think he was manager of the Chicago office.

Mr. McKee: No.

Mr. Whelan: Q. That's what I wanted to find out.

A. I think you will find my memory is quite good.

Q. And I ask you this, Mr. Adams: Why was the interoffice memoranda sent to Mr. Hobmann rather than to the president of National Van Lines?

A. Well, I think a president of any company as large as National Van Lines cannot receive memos such as this from all offices; he has to delegate authority to a particular individual or entrust to a particular individual to handle a certain matter, and I assume that Mr. McKee, who is president of National Van Lines, knowing of this situation, delegated authority or asked Mr. Hobmann to keep a record of this and have it available for Mr. McKee if he should ever want to see it.

Q. Do you know whether or not he did, though, delegate Mr. Hobmann to take care of this particular confusion that you have been testifying about here?

A. Yes, he did. One time on a visit in San Francisco, he directed us to send copies of our memos to Mr. Hobmann in Chicago. I think, in fact, you will find one of those memos we forwarded Mr. Hobmann we were so told by Mr. McKee.

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Q. One of these memoranda that have been introduced here this afternoon?

A. Yes. I think it's one of the ones on the bottom.

Q. Can you tell me this, Mr. Adams: Some of these memoranda indicate your name as typed on the bottom of it. On the original that would be sent to Chicago to Mr. Hobmann, would you sign those?

A. I don't think so, no.

Q. In other words, your name would just be typed on?

A. That's right. I wasn't in the habit on inter-office memoranda of signing them.

Q. Why on some of the interoffice memoranda which are identified here as "A" to "S" is your name on some and no name on others?

A. I think there is only one in that group that has no name on it, which was perhaps an interruption right at the end of the memorandum, telephone call, or some such interruption, which on returning I thought the memo was complete and pulled it and put it in the mail, and therefore it was not.

Q. On these first ones I have been questioning you about, Mr. Adams, from "A" to "G", can you tell how many of those have your signature and which haven't?

Mr. Groen: He said none had his signature that he recalls.

The Witness: No, no signature.

Mr. Whelan: No, the name.

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Mr. Groen: Are you talking about the name on the bottom or the name on the top?

Mr. Whelan: Q. I am sorry. You misunderstand—

A. This has "San Francisco" but no name, and no name down here (indicating). That is the name I am referring to.

Q. That is "G"?

A. No, that's "F". I beg your pardon.

Q. All right.

A. This one has a name on the bottom.

Q. You are referring to "E"?

A. "E". "D" has a name at the top. "C" has a name at the top. "B", "A" and "G" all have names at the top.

Q. That name at the top is the typist, right?

A. That is who it is from.

Q. Right.

A. See, this information is being conveyed to a file, and this memorandum is from whoever would put their name up there to Mr. Hobmann in Chicago, and this information, which is going into a file, I wouldn't be in the habit of putting a signature on every one of them.

Q. Yes. Or having your named typed on it?

A. No, or having my name typed; no. I think you will find on some of those there are three particular cases on a memorandum, and the dates are given, which is what I was referring to in saying that I would make notes on the scratch pad, and

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that they would probably the following day or day after be typed up, and Mrs. Erspan was the one who would type them for me. Don't you find one there that has the date August, and it's eight something, and another one is eight something? They are all on the same memorandum.

Q. These first exhibits that I have questioned you about, "A" through "G", of course, appeared—well, let me put it this way: From "A" to "E" have covered a period of March through July, is that correct?

A. (Examining documents.) March to July?

Q. That's right?

A. Yes, that's correct.

Q. And as I believe you have already testified, your busiest season was between June 1st and roughly the end of September, is that correct?

A. I guess I did, that's correct.

Q. And on this memorandum "H", and I am going to try and speed this up as fast as I can, this refers to a call from a Mrs. McDaniels, and she was confused, according to the memorandum, between the two names. In fact, quoting, she did not realize that there was a difference. This memorandum is one that's from you to the Chicago office, and has your name typed at the bottom. Did you talk to Mrs. McDaniels? A. Yes, I did.

Q. Do you recall what time of the day the call came in? A. No, I don't.

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Q. Did she actually tell you over the phone that she was confused with these two names?

A. I wouldn't have put it on that memorandum if she hadn't. Yes, she did.

Q. She told you that she was confused?

A. After——

Q. After she talked to you?

A. Wait a minute. You say "confused"?

Q. That's right.

A. She said she didn't realize there was a difference, there were two different companies.

Q. I see.

A. Not confused; she didn't know there were two, so she couldn't have been confused.

Q. Then, the words "She was confused between the two names," is your language and not her language, is that correct?

A. That is correct. She would be confused, since she didn't know there were two companies, and she was calling us, thinking she was doing business with National Transfer. She must have been confused.

Q. I notice her address is 396, 11th Avenue, San Francisco. Do you have an Oakland office, also?

A. Did we have a National Oakland office? No. We had—I beg your pardon. We had, in effect, an office, yes. We had an answering service over there which was advertised as an office, and that office relayed calls to us here in San Francisco.

Q. So when the memorandum refers to "our

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(Deposition of Robert W. Adams.)

Oakland Office," it really is referring to your answering service in Oakland?

A. That's right.

Q. At this time during 1952 and 1953, did you have an answering service in San Mateo County and Marin County and Alameda County?

A. No.

Q. So the only place that you had an answering service was in Contra Costa County, right?

A. Correct.

Mr. Whelan: Off the record for a minute.

(Unreported discussion.)

The Witness: You said "Contra Costa"?

Mr. Whelan: That's why I corrected myself here. Then, you had an answering service in Alameda? A. That's correct.

Q. That's the only place you had an answering service, and your only other place of business was here in San Francisco for this area?

A. That's right.

Q. What did this area cover, Mr. Adams? In other words, as district manager what area did you supervise? A. From Monterey on.

Q. From Monterey to the California border?

A. Well, we didn't have—I would say yes, but we didn't have a great deal of business up on the border. I mean there is not the populace.

Q. I notice in some of these memoranda, like "I" and "J", there were phone calls from army personnel. I am referring to a phone call from

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Captain Wild and, "J", to Colonel Lightbody. Was this concerning the overseas contract that National Storage—National Van & Storage had?

A. You mean National Transfer & Storage?

Q. National Transfer & Storage Company had?

A. Would you repeat that? I am not—

Q. Well, there are two memoranda here, "I" and "J", that refer to calls received from a Captain Wild and Colonel Lightbody with regard to their shipments of furniture. One applies to furniture being picked up at the Presidio, and the other refers to furniture to be shipped from Paso Robles to Oakland. What kind of a contract was that under; do you know?

A. That wouldn't be under any blanket contract. Those—if they were from the Government—in some cases officers pay for their own. I don't know definitely whether those were contracted for by the Government, but if they were, they would be one contract for that one move.

Q. In other words, each one is an individual one?

A. That is correct—well, of course, that depends on the type of move, but in that case they would.

Q. Did you personally talk to Captain Wild on August 28, 1952?

A. May I see that memorandum?

Q. Yes.

A. (Examining document.) Yes, I think I did.

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(Deposition of Robert W. Adams.)

Q. Do you remember what time the call came in?
A. I'd say about 9:30.

Q. Did you receive a call from Colonel Lightbody on August 28, '52?

A. May I see that?

Q. Yes.

A. (Examining document.) Pardon me. I do have to take time to think this through—I mean I have been asked before, and they have been switched around here, Lightbody, Reiss, and all these names—in order to get them properly in my mind.

Q. That's why, Mr. Adams, I was taking these memoranda in the same order that you have been asked before by Mr. Groen; so that the order would be the same for the purpose of this deposition.

A. I think once you get off the track—I think I did, yes.

Q. With regard to memorandum "L", concerning a call from Mrs. William E. Martin of Alameda, did you personally take that call from her on 9/15/52?
A. From Mrs.—

Q. Martin. A. Martin.

Q. Of Alameda. I will show you the memorandum.
A. (Examining document.) Yes.

Q. Do you recall what time of the day that phone call came in?

A. I believe it was in the afternoon.

Q. Is it possible, Mr. Adams, on some of these interoffice memoranda, everybody discussed here both during direct and cross-examination, that some

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

of these calls were taken by some one other than you and reported to you?

A. I think earlier in the testimony I said that there was—I think I referred to one which I did not take, yes.

Q. But——

A. However, the office was so small and so close that I was concerned with all of them and knew exactly what was happening and what the circumstances were in all cases. In other words, Mrs.—Miss Erspan discussed anything she might have had on her own with me before she would take any action.

Q. Well, was there more than one instance in these office memoranda which was discussed by Miss Erspan with you where she had received a phone call from any of these people?

A. There may be, yes.

Q. Now, on this memorandum "M", which concerns this Stokely Foods order, as I understand your testimony, you talked directly to Mr. Hutto?

A. That is correct.

Q. And he gave you some of the information that is contained on this memorandum?

A. I think he gave all of the information to me.

Q. You mentioned here that Mr. Hutto lost the card that the traffic manager of Stokely had given him of Mr. Allen's, is that right?

A. That's right.

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(Deposition of Robert W. Adams.)

Q. Did Mr. Allen ever work for National Van Lines?

A. Mr. Allen was working for National Van Lines at that time, yes.

Q. You say that he consulted the telephone directory, and, of course, got the National Transfer & Storage Company instead of this office?

A. Well, he lived, I believe, in Hayward, and he would have an Oakland directory, and got the National Transfer & Storage telephone number. There again the quick glance at a page, and this is the National that he is after, and he called that number and got National Transfer.

Q. Well, you have no trouble, do you, Mr. Adams, in distinguishing between National Van Lines and National Transfer & Storage Company if you were calling them up for, say, a shipment of your goods?

A. Well, having been in the business for eight years, I think I know pretty well, but I am not what I would say would be the average customer who is shopping for a moving company.

Q. I asked you, though, would you have any trouble now?

A. Would I now?

Q. Yes.

A. I think if I were just casually glancing at something and not staring at them, I might have trouble, yes.

Q. You think a person casually glances when he

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

is getting in touch with a company with regard to moving?

A. Yellow page advertising, I think, is more or less based on the quick glance, yes. You try to attract the eye.

Q. How many phone calls did you have from Mr. Hutto on January 17, 52; more than one?

A. Oh, no, I think just—I believe he did call back and say that he had cancelled the order from National Transfer and confirmed the order with us. In the meantime I checked on the van situation and confirmed that we could have a van.

Q. You wrote a letter, or some one wrote a letter, under the date of January 11, 1952, to International Harvester Company, which is marked "O". The signature is LaVern Erspan. You had nothing to do with this particular letter, is that right?

A. I didn't write the letter. I opened the mail and reviewed the mail, and I gave the invoice to her to return.

Q. Yes. You mentioned in testifying, though, that it belonged to the National Transfer & Storage Company, is that right?

A. I was reasonably certain that it did, yes, from the fact that they didn't return it to us.

Q. How do you know that it didn't belong to some one else other than National Transfer & Storage Company?

A. Well, the name National was there. It was in

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connection with a moving company. I know of no other company that there could be confusion between. My logic would lead me to say National Transfer & Storage rather than Lyons.

Q. In other words, you don't know; you are only presuming?

A. Well, I wouldn't want to presume that it was Lyons when it was so evident.

Q. The fact is that you never checked with National Transfer?

A. No, I didn't check with National Transfer.

Q. The same applies to the letter of March 3, 1952, of National Van Lines, marked "P" by you to Transport Clearings of 150 California Street, "It is our opinion that your invoice is intended for National Transfer and Storage Company"? Now, was that invoice addressed to the National Transfer & Storage Company?

A. I believe it was, yes.

Q. Yes. The only question where they made a mistake, then, was on the address?

A. Addressing.

Q. Yes. I have just a couple of more questions.

These memoranda, Mr. Adams, that you have testified here to today cover a period of approximately six to seven months, is that right; from January of '52 to about September of '52?

A. Yes.

Q. You left in May of 1953?

A. Yes.

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(Deposition of Robert W. Adams.)

Q. Were any other office memoranda sent by you after September of 1952 to May of 1953?

A. There may have been some. I think that we discontinued the practice, because we were so short-handed, and we thought that we had a file complete for—in other words, there seemed no further sense in taking the time to do them.

Q. I don't know if I got an answer to my question that I asked earlier, and that is: How many outgoing calls would you make during your peak period from June 1st to September 30th, 1952?

A. How many outgoing calls?

Q. Yes; a day.

A. I think between 100 and 125.

Q. That's outgoing?

A. During the peak period.

Q. And you would receive and handle yourself, personally, between a hundred to a hundred fifty incoming? A. I didn't say 100 to 150, did I?

Q. So it would be a correct statement to say, then, that during that period of time when it was the peak period, you would handle as much as 300 calls a day?

A. I don't think I said that—said I would perhaps in a peak period——

Q. Handle approximately——

A. Handle—you said out calls?

Q. That's right.

A. Maybe a hundred to a hundred twenty-five.

Q. And that you would be involved in another

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(Deposition of Robert W. Adams.)

hundred to a hundred fifty, approximately, of outgoing calls, right, that you, yourself, would handle?

A. No, I said just outgoing calls, a hundred to a hundred twenty-five.

Q. Maybe I misunderstood you, Mr. Adams. How many outgoing calls would you make a day during this particular period?

A. During this particular period?

Q. That's right; from June 1st to September 30, 1952.

A. I thought this period started in March.

Q. Well, I am confining it now to the period of June 1st. I thought you told me your peak period covered the summer months?

A. Oh, yes.

Q. So I am confining my question to that period.

A. And you want to know how many calls I would make out——

Q. That's right.

A. I would say a hundred to a hundred twenty-five in the peak period.

Q. So it would be fair to say, then, that during the peak period of June 1, 1952, to September 30, 1952, you would handle personally between a hundred and a hundred and twenty-five incoming calls, and would personally make approximately a hundred to a hundred fifty outgoing calls, is that correct?

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A. A hundred to a hundred fifty outgoing calls?

Q. That's right.

A. I said a hundred to a hundred twenty-five outgoing calls.

Q. I am sorry if I misstated——

A. I will say this: Perhaps in a peak period the total in and out, I might have taken 200 a day, yes—in the very high peak period.

Mr. Whelan: I have no further questions.

/s/ R. W. ADAMS

State of California,

Northern District of California,

City and County of San Francisco—ss.

I hereby certify that on Saturday, the 12th day of June, 1954, at 1:30 o'clock p.m., before me, M. W. McGill, a notary public in and for the City and County of San Francisco, State of California, at Room 485, St. Francis Hotel, San Francisco, California, personally appeared pursuant to Notice of Taking Depositions, Robert W. Adams, called as a witness on behalf of the plaintiff; and Messrs. Wilkinson, Huxley, Byron & Hume, represented by Gerrit P. Groen, Esquire, appeared as attorneys for the plaintiff; and Howard B. Turrentine, Esquire, C. P. Von Herzen, Esquire, and S. L. Laidig, Esquire, represented by John J. Whelan, Esquire, appeared as attorneys for the defendant;

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

and the said Robert W. Adams being by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and being carefully examined, deposed and said as appears by his deposition hereto annexed.

And I further certify that the said deposition was then and there reported by me, a duly certified reporter and a disinterested person, and was transcribed by me; and I further certify that at the conclusion of the taking of said deposition, and when the testimony of said witness was fully transcribed, said deposition was submitted to and read by said witness and thereupon signed by him in my presence, and that the deposition is a true record of the testimony given by said witness.

And I further certify that the said deposition has been retained by me for the purpose of securely sealing it in an envelope and directing the same to the clerk of the court as required by law.

And I further certify that I am not of counsel or attorney for either or any of the parties, nor am I interested in the event of the cause; I further certify that I am not a relative or employee of or attorney or counsel for either or any of the parties, nor a relative or employee of such attorney or counsel, nor financially interested in the action.

In Testimony Whereof, I have hereunto set my hand and official seal at the City and County of San

Plaintiff's Exhibit No. 49—(Continued)

(Deposition of Robert W. Adams.)

Francisco, State of California, this 28th day of
June, A.D. 1954.

[Seal] /s/ M. W. McGILL,
Notary Public in and for the City and County of
San Francisco, State of California

[Endorsed]: Filed June 29, 1954.

PLAINTIFF'S EXHIBIT No. 50

[Title of District Court and Cause.]

DEPOSITION OF JOHN G. MORGAN

Appearances: Mr. Gerrit P. Groen and Mr. Kenneth T. Snow, for the Plaintiff. Messrs. Bair, Freeman & Molinare, by Mr. W. M. Van Sciver, for the Defendant.

Deposition of John G. Morgan, a witness of lawful age, taken on behalf of the plaintiff in the above entitled cause, wherein National Van Lines, Inc. is the plaintiff and Alfred E. Dean, trading under the firm name and style of National Transfer & Storage Company, is the defendant, pending in the District Court of the United States for the Southern District of California, Central Division, pursuant to the notice annexed hereto, before J. H. Catellani, a Notary Public in and for the State of Illinois, County of Cook, at Suite 1604, 38 South Dearborn Street, in the City of Chicago, State of Illinois, on the 2nd day of December, 1954.

Plaintiff's Exhibit No. 50—(Continued)

JOHN G. MORGAN

a witness named in the annexed notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination

By Mr. Groen:

Mr. Groen: Off the record.

(Discussion had off the record.)

Mr. Groen: Q. Will you please state your full name?

A. John G. Morgan, M-o-r-g-a-n, 3600 North Keeler Avenue.

Q. What business are you in, Mr. Morgan?

A. I'm in local storage and long distance business.

Q. That is the business of moving and storing furniture?

A. Yes; and long distance moving.

Q. And long distance moving? A. Yes.

Q. How long have you been in that business?

A. 34 years last July.

Q. Have you been in this business in various parts of the country, or only in Chicago?

A. All in Chicago. I went in the moving business July 6, 1920, for the Union Express Company.

Q. Now, Mr. Morgan—

A. Well, I was going to add to that.

Q. I'm sorry, I didn't mean to interrupt.

A. Then I went with Evanston Fireproof Storage. In 1932, I started my own business, and 1935,

Plaintiff's Exhibit No. 50—(Continued)

(Deposition of John G. Morgan.)

incorporated. And I have been in that business up to now.

Q. Now, Mr. Morgan, I show you Plaintiff's Exhibit No. 1, which is a mark comprising the words National Van Lines with the vertical stripes with it. Are you familiar with that? A. Yes.

Q. How long have you known that composite mark—everything together?

A. Well, I have known Mr. McKee since about 1927.

Q. How long have you known that mark as shown here in Exhibit No. 1?

A. To my knowledge, about 1935, or 1936, something like that.

Q. You said that you are in the national—or the long distance—moving field, and are you familiar with many of the long distance movers over the country? A. Yes.

Q. Have you ever seen other long distance movers who use a mark having vertical stripes like that, and using the word National?

A. Never saw them.

Q. Does a mark of this character, including the word National in the stripe, mean more than one company to you, or just one?

A. National Van Lines, Inc.

Q. It means only National Van Lines?

A. That's right.

Q. And you have seen it that way since about 1935 or 1936? A. Yes.

Plaintiff's Exhibit No. 50—(Continued)

(Deposition of John G. Morgan.)

Q. Have you seen it frequently?

A. I saw it as far back as I can remember.

Q. Have you seen it, you mean, since the first time that you saw it—that is, regularly?

A. That's right.

Q. Were you an agent for Allied Van Lines at one time?

A. No, I was a leased operator.

Q. A leased operator?

A. Yes. During the war, I operated two vans, sometimes four, for three years straight, leased to Allied from the East to West Coast, but I would have the privilege of breaking that lease.

Mr. Groen: You may cross examine.

Cross Examination

By Mr. Van Sciver:

Q. Did you ever hear of a company in Chicago by the name of National Shippers and Movers, Inc.? A. No.

Q. You say you know Mr. McKee quite well—the President of the plaintiff?

A. Yes. I never knew that name.

Q. Is it your recollection that the plaintiff here always used the name National Van Lines, Inc.?

A. That is as far as I can remember they did.

Q. And how far back would that be?

A. Well, I started doing business with him in about 1934.

Q. Not before 1934?

Plaintiff's Exhibit No. 50—(Continued)

(Deposition of John G. Morgan.)

A. No. I was working for somebody else in this business, and I knew Mr. McKee way back when he was in the express business on Wells Street. He came up and formed that company. In fact, Mr. McKee and I both went into—at the same time—to prove our State rights—grandfather rights—however, at that time, he participated in the independent group and I pulled away from them and went with household goods carriers. I participated in that tariff for about a year, then I went back into the independent. So that has been our connection.

Q. Do you know when Mr. McKee formed his own company?

A. Well, I know just about when it was.

Q. I mean, approximately—about the—year it was?

A. Well, around about the first part of the '30's. That's as near as I can remember.

Q. Could it have been as early as October, 1928?

A. Well, yes, it could have been.

Q. I show you this page out of one of the official Government publications, marked Defendant's Deposition Exhibit No. 1. In the lower right-hand corner you will note the words "National Van Lines, Inc.", correct? You do see that there, do you not?

A. Yes.

Q. You will notice it says, "Claims use since October, 1928." Does that refresh your memory when you first may have seen this name?

A. Well, it could be, yes.

Plaintiff's Exhibit No. 50—(Continued)

(Deposition of John G. Morgan.)

Q. Did you ever see—

A. I will tell you, I didn't pay much attention at first because we were right in a depression there, and I—I peddled coal for 35 cents a bag. I know what it was in those days. You were very lucky to retain a load those days. I went in and got my own interstate rights by myself, because I couldn't afford counsel.

Q. Did you ever see this mark used by National Van Lines, Inc. without a shield?

Mr. Groen: Counsel, may I inquire, do you mean shield or stripes?

Mr. Van Sciver: Q. Without the entire shield here shown in Plaintiff's Exhibit No. 1? In other words, did you ever see it used as shown in Defendant's Deposition Exhibit No. 1?

A. I drive the highway all the time. It is six years since I have had this; and I can see that emblem sometimes as much as a mile away, and we start blinking our lights when we see that, because we know it is perfect identification. They see my name up in the front of that truck. I see that emblem. Now, there is a slight resemblance in that emblem with Grey Vans off at a distance, but when it comes up to me, I see the difference.

Q. What does Grey Van Lines have?

A. They have a white side, but it is a gray van. Well, it's white in the center and something like a ball, but off at a long distance, we'll say about three-quarters of a block, the first impression comes to my

Plaintiff's Exhibit No. 50—(Continued)
(Deposition of John G. Morgan.)

mind, "It could be National." Then when he gets up closer, it is easy to tell that it is Grey Van.

Mr. Groen: For the record, he is referring to the insignia, or mark, shown in Plaintiff's Exhibit No. 1.

Mr. Van Sciver: Yes.

Mr. Groen: He was referring to it right along.

Mr. Van Sciver: Q. Are you familiar with the shield of the United States Olympic Committee?

A. No. I'm just a mover.

Q. Well, I think there are a good many citizens who aren't athletes who are familiar with that shield? Do you ever go to any football games?

A. I don't like football. I like baseball.

Q. Baseball? Oh. Did you ever look at the insignia on the arms of National League and American League ball players?

A. I never took particular notice. All I notice is the play.

Q. Did you ever see a shield similar to the one on Plaintiff's Exhibit No. 1 on the uniform of big league ball players?

A. I never paid particular attention. I just pay attention to who he is, but I do look at that flag. I love that flag blowing up there.

Q. It is a fact that some trucking companies have patriotic reasons for using the Olympic shield on their trucks in order to get people interested in—

A. What do you mean by "olympic"?

Plaintiff's Exhibit No. 50—(Continued)

(Deposition of John G. Morgan.)

Q. The olympic shield, sir, is exactly like this, sir, with the exception it has a couple figures instead of nationwide, and it is used by trucks.

A. The truckers don't use it at all.

Q. I understand it is put on trucks by trucking companies to get people to subscribe monies for the olympic games. Do you know that to be a fact?

A. Well, I don't know about that. If you look at—Well, I'm out on the highway; I never look at freight trucks—nothing but vans—because I'm primarily interested in them.

Q. Are you familiar with the shield of the President of the United States?

A. Do I have to answer that?

Q. Yes.

Mr. Groen: You may, if you want to. It is irrelevant, and I object to it as not having anything to do with the case.

The Witness: Well, I don't care to show my ignorance.

Mr. Groen: Off the record.

(Discussion had off the record.)

Mr. Van Sciver: Q. Are you familiar with the company National Van Lines of Milwaukee?

A. I only heard of them once. That was about a year ago—two years ago. They tried to steal a job from National Van Lines. This company—now, I heard this, I don't know. But they tried to negotiate to take this job away from National Van Lines, Inc. which I was the agent for to pick up in Miami,

Plaintiff's Exhibit No. 50—(Continued)

(Deposition of John G. Morgan.)

Florida, and I finally got the job, which I was ordered to pick up, but this fellow that I took the job from, he told me that National Van Lines of Milwaukee, Wisconsin was trying to get the job away from me. That's the only time I heard of them.

Q. You say you are an agent for National Van Lines, Inc.?

A. I'm a booking agent and a leased operator for them. In other words, we exchange business.

Q. How long has that relationship been in existence? A. Since 1938.

Q. Just how does that relationship work? Give us a typical example of a transaction between the two companies?

A. Well, I lease my equipment to them.

Q. You do what?

Mr. Snow: He leases his equipment to them.

Mr. Van Sciver: Oh.

The Witness: All of my loads out of my limitations. Then there are other cases where I want National to handle a job for me. I turn it over to them, and they in turn handle it and they give me a commission for that. I in turn give them a commission for hauling on their paper.

Mr. Van Sciver: Q. Do you know Mr. Moss who testified in this case? That is Harold T. Moss?

A. No, I don't.

Q. Do you know Mr. Ross?

Plaintiff's Exhibit No. 50—(Continued)
(Deposition of John G. Morgan.)

A. I have heard of him. I have had a little bit dealings with him a couple of times, that's all.

Q. Do you know if Mr. Ross's company is Union Van Lines?

A. Well, I have heard of it. I don't know. I don't know exactly what it is.

Q. Do you know if they have the same kind of arrangement with the plaintiff here?

A. I don't know. I wouldn't know what it is.

Q. Do you know if Transcontinental Van Lines does? A. Never heard of them.

Q. You have heard of the National Carloading Corporation, have you not?

A. Well, back years ago, we used to ship household goods crated through them. That is a Jensen—freight forwarding, that's all.

Q. How long back do you know that company?

A. Oh, I don't know how long. They came in after Jensen, I know that.

Q. After what?

A. Jensen Freight Forwarding. I think it was, oh, possibly 1938 or 1940.

Q. Did you know of a company operating out of New York by the name of National Moving and Warehouse Corporation? A. No.

Q. National Trailer Convoy, Inc., Oklahoma?

A. Never heard of them.

Q. National Freight, Inc., New Jersey?

A. No.

Q. National Truck Company, Florida?

Plaintiff's Exhibit No. 50—(Continued)

(Deposition of John G. Morgan.)

A. No.

Q. National Air Transport, Inc., Chicago?

A. No.

Q. Did you know that—

A. I might have heard of the name, but I never gave it any thought—to any of them, for that matter.

Q. Well, isn't it a correct statement that the word National is a fairly common name in your business?

Mr. Groen: Objection to the question as irrelevant.

Mr. Van Sciver: Q. Aren't there quite a few companies that use that name now? The word National with some other phrase?

A. Well, I don't—Ask that question again, will you please?

Q. Aren't there quite a few companies at present in your business which use the word National as part of their corporate name?

A. I don't know of any one in particular.

Q. Well, are there quite a few, regardless of whether you know of any in particular? You do know that there are some, do you not?

A. Well, I do know of a National Cemetery.

Q. No, I mean in your business—in the moving—the trucking—business?

A. I don't know of anyone to speak of.

Q. Do you know of National Carloading Corporation, 1018 South Wabash?

Plaintiff's Exhibit No. 50—(Continued)

(Deposition of John G. Morgan.)

A. I have heard of them, yes.

Q. National Van Lines, Inc.—that's the plaintiff here. Do you know of National Cartage Company, 1017 West 48th Street? A. No.

Q. You answer no? A. No.

Q. Do you know of National Freight Lines, 221 West Roosevelt? A. No.

Q. National Produce Carriers, 4241 South Halsted? A. No.

Q. Nationwide Carriers, Inc.?

A. Well, that word nationwide, you could connect that with black body carriers, something of that sort.

Q. No, this is the name of a company I am giving you. A. Never heard of them.

Q. National Cartage at 10014 South Kostner?

A. No.

Q. They are companies in Chicago, and you never heard of any of those?

A. I don't pay any attention to freight carriers.

Q. Isn't it true you know of National Van Lines, Inc. primarily through the——

A. I know of that through——

Q. Let me finish my question, sir.

A. Yes.

Q. ——primarily through your business relations with the company, and your acquaintanceship with Mr. McKee?

A. That's why I know them so well, because I know practically every officer they have ever had in

Plaintiff's Exhibit No. 50—(Continued)

(Deposition of John G. Morgan.)

the company since they started. I have been in the moving business, associated with their company, because they do a good job. I have never turned a shipment over to National Van Lines yet that was ever mishandled. Our relationship has been absolutely good ever since we started with them, so, therefore, I am not interested in any other company. I don't bother to see what they are doing. I mind my own business.

Q. You think they're a pretty nice outfit then?

A. Yes. I don't think there is anybody in the moving business that's more capable of doing a first class moving job than National Van Lines is, unless it be Morgan.

Mr. Van Sciver: That's all.

Mr. Groen: Nothing further.

Mr. Van Sciver, with the consent of the witnesses, will you stipulate that we may waive the signatures?

Mr. Van Sciver: Yes.

Mr. Groen: Off the record.

(Discussion had off the record.)

Mr. Groen: May the record show that with respect to the exhibits offered by defendants during this session of depositions; namely, 1, 2 and 3, are not objected to on the basis of authenticity, or what they may show, but there is a definite objection on the basis of relevancy, as it is believed that this material is entirely irrelevant.

Plaintiff's Exhibit No. 50—(Continued)

(Deposition of John G. Morgan.)

State of Illinois,

County of Cook—ss.

I, J. H. Catellani, a notary public duly commissioned and qualified in and for the County of Cook, State of Illinois, do hereby certify that pursuant to the notice hereto annexed, there came before me on the 2nd day of December, 1954, at 3:15 o'clock p.m., at Suite 1604, 38 South Dearborn Street, in the City of Chicago, Illinois, the following named person, to-wit John G. Morgan, who was by me duly sworn to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath and his examination reduced to writing by me; that the deposition is a true record of the testimony given by the witness.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

In witness whereof I have hereunto set my hand and affixed my notarial seal this 7th day of December, 1954.

[Seal] /s/ J. H. CATELLANI,
Notary Public

[Endorsed]: Filed December 9, 1954.

PLAINTIFF'S EXHIBIT No. 51

[Title of District Court and Cause.]

DEPOSITION OF HAROLD T. MOSS

Appearances: Mr. Gerrit P. Groen and Mr. Kenneth T. Snow, for the Plaintiff. Messrs. Bair, Freeman & Molinare, by Mr. W. M. Van Sciver, for the Defendant.

Deposition of Harold T. Moss, a witness of lawful age, taken on behalf of the plaintiff in the above entitled cause, wherein National Van Lines, Inc. is the plaintiff and Alfred E. Dean, trading under the firm name and style of National Transfer & Storage Company, is the defendant, pending in the District Court of the United States for the Southern District of California, Central Division, pursuant to the notice hereto annexed, before J. H. Catellani, a Notary Public in and for the State of Illinois, County of Cook, at Suite 1604, 38 South Dearborn Street, in the City of Chicago, State of Illinois, on the 2nd day of December, 1954.

HAROLD T. MOSS

a witness named in the annexed notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination

By Mr. Groen:

Q. Will you please state your full name?

A. Harold T. Moss.

Plaintiff's Exhibit No. 51—(Continued)

(Deposition of Harold T. Moss.)

Q. And your address, Mr. Moss?

A. Home address? Q. Home address.

A. 6460 North Winchester Avenue.

Q. What is your occupation, Mr. Moss?

A. President of Transcontinental Van Lines,
and Managing Director.

Q. Offices in Chicago?

A. In Chicago, yes, sir.

Q. Is that a moving and storage business?

A. Long distance moving and storage business.

Q. How long have you been with them?

A. Four years.

Q. Were you in the moving and storage business
prior to that? A. Yes.

Q. How many years?

A. Total of 20 years, about.

Q. And in what other parts of the country have
you worked?

A. In New York and Chicago.

Q. And were you usually in an executive capa-
city? A. Yes, sir.

Q. I'm showing you Plaintiff's Exhibit No. 1
attached to the complaint, and ask you if you are
familiar with that mark comprising that name and
insignia? A. Yes, I am.

Q. You are? A. Yes.

Q. How long have you been familiar with that
and seen it? A. I would say since 1934.

Q. Do you know whom it represents?

A. National Van Lines.

Plaintiff's Exhibit No. 51—(Continued)
(Deposition of Harold T. Moss.)

Q. And do you know this while you were in New York?

A. Yes, sir, I did. They had their office in the same building we had ours, and their trucks parked in the same lot as ours did—the company I was with at the time.

Q. Have you seen it continuously since the first time you saw it in 1934? A. Yes, sir.

Q. Have you any idea how long the marks and the stripes together have been in the field?

A. Yes, sir, they have been in the field since 1934, that I know of.

Q. You are speaking of the storage and transfer field?

A. Yes, sir—in our own industry.

Q. And have you ever seen a mark similar to that used by others with the stripes?

A. Yes, I have.

Q. Whose was it?

A. National Transfer & Storage of San Diego—Dean Van Lines.

Q. Also known as Dean Van Lines?

A. Yes.

Q. When did you first see that?

A. To the best of my recollection, I would say the early part of this year—say April or May of this year. I am not certain as to the exact date.

Q. When you say you first saw that, are you referring to the whole mark—the name and stripes?

A. The stripes.

Plaintiff's Exhibit No. 51—(Continued)

(Deposition of Harold T. Moss.)

Q. You saw the whole thing first at that time, or did you see the stripes first at that time?

A. I saw the whole thing.

Q. You didn't see the name, National Transfer & Storage, or Dean Transfer & Storage before?

A. No.

Q. Where was it you saw this National Transfer & Storage mark?

A. They backed into our warehouse to unload a shipment for storage or transit, and at the time they were backing in, I thought it was a National Van Lines truck.

Q. What made you think so?

A. On account of the emblem on it—this striped affair.

Mr. Groen: You may cross examine.

Cross Examination

By Mr. Van Sciver:

Q. Mr. Moss, you say that you have been in the moving and storage business, is that correct?

A. That's right, sir.

Q. Since 1934? A. Yes, '34.

Q. So that when you started in that business— A. Yes, sir.

Q. —what company were you with in New York?

A. I was in New York with Union Van System, an associate company of Transcontinental Van Lines at 4015 Broadway in Chicago, and after that,

Plaintiff's Exhibit No. 51—(Continued)

(Deposition of Harold T. Moss.)

I was with the Lexington Moving and Storage Company, and managed it. I left the Union Lines and came back there. I was with another company, too.

Q. What other company were you with?

A. Concord Storage and Transfer.

Q. And where were they located?

A. In the Bronx, New York.

Q. While you were in New York, did you ever hear of a company by the name of National Moving and Warehouse Corporation?

A. Yes, sir, I did.

Q. When did you first hear of that company?

Mr. Groen: Object to that line of testimony as being irrelevant.

The Witness: Do you want me to answer the question, sir?

Mr. Groen: Yes.

A. I know that company since—well, I would say, almost 15 years. I would say National Moving and Warehouse Corporation—is that what you said?

Mr. Van Sciver: Q. Yes.

A. That's right, they were in the Bronx, New York, too. I wouldn't be certain as to the exact—I think it is 15.

Q. Did you ever hear of a company by the name of National Van Lines that operated out of Milwaukee?

A. Yes, sir.

Plaintiff's Exhibit No. 51—(Continued)
(Deposition of Harold T. Moss.)

Q. How long back did you hear of that company?

A. That company I heard of—I heard of that company back to, I would say, about the war time, say about 1940.

Q. Did you ever hear of a company by the name of National Trailer Convoy, Inc.?

A. That, I don't know, sir.

Q. Out of Oklahoma? A. No, sir.

Q. National Freight, Inc. in New Jersey?

A. No, sir.

Q. National Truck Co., Florida?

A. No, sir.

Q. It is true, at the time you entered this business, that you knew of many other companies not necessarily in the moving and storage business, that used the name National as part of their corporate name?

A. Perhaps, vaguely; being outside of their industry, not taking too much notice of them—occasionally, say. The names you mentioned don't strike a bell at the moment, except those in our own industry.

Q. Do you know at the present time there are over twelve hundred companies listed with the name National in the New York telephone directory?

A. No, sir, I didn't know there were that many.

Q. Do you know that in the Chicago directory,

Plaintiff's Exhibit No. 51—(Continued)
(Deposition of Harold T. Moss.)

there is over five hundred companies with the name National?

A. I didn't know that, no. It never entered my mind.

Q. Did you know of any companies in the moving, storage, freight forwarding, or trucking field with the name National at the time you started in this business? A. Yes.

Q. And what were they?

A. National Movers of Boston, and National Movers of New York.

Q. Those two companies were in existence at the time you started in the business in 1934, is that correct?

A. Around that time, I would say so, or 1935, perhaps. I think the National Movers of Boston was about 1934, but the National Movers of New York was about '35 or '36. I am not too certain of that date. Time flies.

Q. Were National Movers of Boston actually in the business when you started in it?

A. Yes, I would say they were.

Q. Do you know how far back they went before you entered the business?

A. No. The reason I got acquainted with them is when the Government took over the industry under the National Commerce Act, they were, perhaps, in the business five years previous to that. I am not certain. I just knew the owner of the company.

Plaintiff's Exhibit No. 51—(Continued)

(Deposition of Harold T. Moss.)

Q. Did you ever hear of a company by the name of National Air Transport? A. No.

Q. Did you ever hear of a company by the name of Piehl, P-i-e-h-l, Transfer and Storage Company of Portland, Oregon? A. No, sir.

Q. Never heard of it?

A. No, not to my recollection. At this time, I would say not.

Q. Referring to Plaintiff's Exhibit No. 1, which is the trademark registration, you were asked on direct examination if you had seen that shield in connection with the defendant's trucks, were you not? A. Yes, sir.

Mr. Groen: I think I said the stripes.

Q. Did I not? A. Yes, sir, the stripes.

Mr. Van Sciver: All right.

Q. When did you see that?

A. To my knowledge, about April or May of this year. I am not certain, just a fleeting glimpse. It struck me—I thought it was one of McKee's trucks, and it was one of these Dean Van Lines. I didn't pay attention to it.

Q. Was the shield on the Dean truck the same as the National shield?

A. It would seem to me it was at the time, sir. It would seem that way.

Q. Isn't it a fact that the shield on the Dean trucks is in the form of a map of the United States, rather than a shield?

A. Gosh, I don't know. On this particular truck,

Plaintiff's Exhibit No. 51—(Continued)

(Deposition of Harold T. Moss.)

they were associated with Howard Van Lines, and they might have had Howard Van Lines on half. I didn't pay particular attention to that.

Q. You don't recall, of your own knowledge, whether it was a shield or map of the United States?

A. To the best of my recollection, I would say it was a shield. It seemed to me that way. It had the stripes. To me it seemed to be a National Van Lines piece of equipment, but, as I say, I wasn't too interested at the time.

Q. Are you familiar with the shield used by the Union Pacific Railroad?

A. I should be, but at this time—I have seen it but it is almost similar to one of these. I don't know exactly now.

Q. Well, isn't it a fact that it is substantially the same as the shield shown in Plaintiff's Exhibit No. 1?

A. That, I wouldn't know. I wouldn't know that much about the picture of the Union Pacific shield as compared to the National Van Lines. That, I wouldn't know.

Q. Do you remember if the Union Pacific shield has vertical stripes on it?

A. I honestly don't know. I should know, but I don't. I just can't visualize it for the moment. I should know it because I have done business with Union Pacific and have had their correspondence and catalogs in the office, and literature. It would

Plaintiff's Exhibit No. 51--(Continued)
(Deposition of Harold T. Moss.)

vaguely seem to be a shield of that kind, but I am not too certain.

Mr. Van Sciver: Off the record.

(Discussion had off the record.)

Mr. Van Sciver: Q. Mr. Moss, are you familiar with the shield of the United States Olympic Committee? A. No, sir, I would say not.

Mr. Groen: I object again to this line of testimony as being irrelevant.

Mr. Van Sciver: Q. Are you familiar with the shield of the President of the United States?

A. Well, I would say yes.

Q. And isn't it substantially identical with the shield shown in Plaintiff's Exhibit No. 1?

A. Well, it—I don't think there is too much of a close resemblance from my—some part of the structure, apparently, has similar resemblance, but not the entire structure of it.

Q. Do you recall that the vertical stripes are present in both?

A. It would seem that way to me, sir, yes.

Q. And isn't it true that the vertical stripes in both cases are red and white?

A. Perhaps, yes. I don't know.

Q. Isn't it also a fact that many moving, storage and freight companies use a map of the United States in their advertising or on their trucks?

A. Some do. Some do, to my recollection. United Van Lines—I used to work with them—they had a map of the United States in their advertisements

Plaintiff's Exhibit No. 51—(Continued)

(Deposition of Harold T. Moss.)

and on their trucks. They possibly took it off. I don't know if they have it on there now or not.

Q. It is a fairly common thing in the trucking and moving business, is it not—if not on the trucks themselves, in advertising and telephone directories?

A. It is in the telephone directories to convey to the general public they go all over the United States, so they include a map in their advertisement. In our own industry; I don't know about the freight industry.

Mr. Van Sciver: I would like to have this marked as Defendant's Deposition Exhibit No. 1, for identification.

(Document marked as requested.)

Mr. Van Sciver: First I would like to ask Mr. Groen if he would stipulate that this is—subject to correction—a photostat of the Official Gazette, United States Patent Office—Official Gazette, page 651, June 17, 1952.

Mr. Groen: I so stipulate.

Mr. Van Sciver: To which I have added in pencil the date of issue of registration number 563,950.

Mr. Groen: I assume that is all correct. There is no dispute about that.

Mr. Van Sciver: Q. Mr. Moss, down in the lower right-hand corner of Defendant's Deposition Exhibit No. 1, for identification, there is a publication of a trademark, National Van Lines, Inc., owned by National Van Lines, Inc. who is the plaintiff in

Plaintiff's Exhibit No. 51—(Continued)

(Deposition of Harold T. Moss.)

this present suit. You will note that that does not include the shield, correct? A. Right.

Q. Have you ever seen the National Van Lines, Inc. as shown in Defendant's Deposition Exhibit No. 1, for identification, used on any trucks of the plaintiff without the shield?

A. I would say not. The reflection to my mind from the long years of knowing the company and seeing the equipment continuously, it reflected the shield at all times, and was synonymous with the name National Van Lines. That was always in the back of my head though I didn't know too much about it in New York or here.

Mr. Van Sciver: I would like to have the reporter mark Defendant's Deposition Exhibit No. 2, the cover page for the June, 1954 Chicago Telephone Directory, and pages 1343, 1344, and 1345, and I will ask Mr. Groen if he will stipulate, subject to correction, that those are true and correct photostatic copies of those pages of the Chicago Telephone Directory?

Mr. Groen: Yes, I'm sure they are.

(Documents marked as requested.)

Mr. Van Sciver: Q. You will note, Mr. Moss, I believe, that there are—The word National appears continuously on practically all of those three pages, correct? A. Correct, sir, yes, sir.

Mr. Van Sciver: I would like to mark—have the reporter mark—as Defendant's Deposition Exhibit No. 3, for identification, the cover page—make that

Plaintiff's Exhibit No. 51—(Continued)

(Deposition of Harold T. Moss.)

3-A, 3-B, 3-C, 3-D, 3-E, 3-F, 3-G, 3-H, pages 727, 1208, 1212, 1213, 1215, 2009 and 2019 of the Chicago Red Book, classified telephone directory.

(Documents marked as requested.)

Mr. Groen: Let me state for the record here, that I think this is completely irrelevant as far as this witness is concerned, and if counsel wishes to get them in as for whatever they say, and they state on their face whatever they stand for, and I think it is irrelevant as far as this witness is concerned.

Mr. Van Sciver: All right. I will offer them in evidence, but there are a couple questions I would like to ask him about this Red Book.

Mr. Groen: I think it is beyond the scope of the direct.

Mr. Van Sciver: He already mentioned he has seen maps of the United States.

Mr. Groen: Don't the exhibits speak for themselves, Mr. Van Sciver?

Mr. Van Sciver: Well, we will just take one that you did not mention.

Q. Look at page 1213. Is it not a fact that the Jensen Movers show a map of the United States in their ad?

A. Yes. I did notice that until now.

Q. Now, is it not a fact that the term nationwide is one used rather extensively in the trucking business today?

A. In our industry, yes.

Q. And it has been for some time?

Plaintiff's Exhibit No. 51—(Continued)

(Deposition of Harold T. Moss.)

A. Apparently so, sir.

Q. I don't believe you stated your age, sir?

A. Fifty-three.

Q. You were born around 1903?

A. July 4, 1901. I was 53 July 4th.

Q. So, in 1928, you were about 27?

A. 27, that's right.

Q. What business were you in then?

A. At that time I was supervisor for the Metropolitan Life Insurance Company.

Q. Where? A. In Philadelphia.

Q. At that time, did you know of any companies in the moving or trucking business that used the name National?

A. I would say no, not at that time, no. Just since 1934.

Q. Were you a native Philadelphian?

A. I am a native Pennsylvanian. I come from the east part of Pennsylvania.

Q. Did you ever hear of National Freight, Inc.? They operate in New Jersey.

A. No, sir. Not to my present knowledge. I would say no.

Mr. Van Sciver: That's all.

Mr. Groen: Just two short questions, Mr. Moss:

Q. Showing you this exhibit, Exhibit No. 4 to plaintiff's amended complaint, is that the striped design you saw on the truck of Dean?

A. Yes.

Q. It is? A. Yes, sir.

Plaintiff's Exhibit No. 51—(Continued)

(Deposition of Harold T. Moss.)

Q. In connection with these other nationals you referred to—firms by the name of National in the moving business, other than National Van Lines, and Dean's—did you ever see the word National with the striped design? A. No, sir.

Mr. Van Sciver: Let me ask you just one question—probably——

The Witness: Okay.

Mr. Van Sciver: Q. You apparently didn't observe this truck insignia very closely that you saw on the load that you testified about, is that correct?—this Dean insignia?

A. I would have to explain this a little more to you. With my knowledge of this National Transfer & Storage Company—I knew this company in general in New York. It seemed to me he always reflected some sort of emblem which was part of National Van Lines. It seemed to me they were part of National Van Lines. In shipping by railroad, Union Pacific shipped big things for the National industries, and a railroad may have come to National Storage in San Diego; and in their correspondence it seemed to me it was reflected, this emblem, which sort of confused me at the time. I never paid direct attention to it. In the advertisement in the D. & W.—Distributors and Warehousemen—they are listed as receiving agents.

Mr. Groen: Q. Who is listed?

A. The National Transfer & Storage Company.

Mr. Van Sciver: Q. Well, the map of United

Plaintiff's Exhibit No. 51—(Continued)

(Deposition of Harold T. Moss.)

States and a shield of the type shown in Plaintiff's Exhibit No. 1, are certainly different, aren't they?

Mr. Groen: I object to the question, because we are talking about the stripes, not the outlines.

Mr. Van Sciver: Well, I'm talking about the outlines.

Q. They are different, aren't they?

A. Well, apparently they are. I don't know.

Mr. Van Sciver: Okay.

Mr. Groen: That's all.

State of Illinois,

County of Cook—ss.

I, J. H. Catellani, a notary public duly commissioned and qualified in and for the County of Cook, State of Illinois, do hereby certify that pursuant to the notice hereto annexed, there came before me on the 2nd day of December, 1954, at 2:20 o'clock p.m., at Suite 1604, 38 South Dearborn Street, in the City of Chicago, Illinois, the following named person, to-wit Harold T. Moss, who was by me duly sworn to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath and his examination reduced to writing by me; that the deposition is a true record of the testimony given by the witness.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of

Plaintiff's Exhibit No. 51—(Continued)

(Deposition of Harold T. Moss.)

the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

In witness whereof I have hereunto set my hand and affixed my notarial seal this 7th day of December, 1954.

[Seal] /s/ J. H. CATELLANI,
Notary Public

[Endorsed]: Filed December 9, 1954.

PLAINTIFF'S EXHIBIT No. 52

[Title of District Court and Cause.]

DEPOSITION OF JOSEPH S. ROSS

Appearances: Mr. Gerrit P. Groen and Mr. Kenneth T. Snow, for the Plaintiff; Messrs. Bair, Freeman & Molinare, by Mr. W. M. Van Sciver, for the Defendant.

Deposition of Joseph S. Ross, a witness of lawful age, taken on behalf of the plaintiff in the above entitled cause, wherein National Van Lines, Inc. is the plaintiff and Alfred E. Dean, trading under the firm name and style of National Transfer & Storage Company, is the defendant, pending in the District Court of the United States for the Southern District of California, Central Division, pur-

Plaintiff's Exhibit No. 52—(Continued)

(Deposition of Joseph S. Ross.)

suant to the notice hereto annexed, before J. H. Catellani, a Notary Public in and for the State of Illinois, County of Cook, at Suite 1604, 38 South Dearborn Street, in the City of Chicago, State of Illinois, on the 2nd day of December, 1954.

JOSEPH S. ROSS

a witness named in the annexed notice, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination

By Mr. Groen:

Q. Will you state your name, please?

A. Joseph S. Ross.

Q. And your home address, Mr. Ross?

A. 3526 Pine Grove.

Q. And what is your business, Mr. Ross?

A. Moving and storage.

Q. How long have you been in that business?

A. I have been in the business about 25 years.

Q. What is the name of your present organization?

A. The Union Van Line, Inc.

Q. Are you an officer? A. Yes.

Q. What office do you hold?

A. I hold the Presidency over there.

Q. And do they have offices in Chicago?

A. Oh, yes.

Q. And how long have you been with the Union company? A. Ever since I started it.

Plaintiff's Exhibit No. 52—(Continued)

(Deposition of Joseph S. Ross.)

Q. How long ago? Just roughly.

A. I would say I started the Union in January in 1933.

Q. You say you have been in this business about 25 years? A. That's right.

Q. Transfer and storage business?

A. Yes. Prior to that, I worked for a company in the moving business.

Q. Will you give us a little history of that? What companies you were with and their locations.

A. The Continental Van Lines, Philadelphia, Pennsylvania. In 1933, I started my own business—in 1933. Incorporated in 1934, I think.

Q. I take it you are familiar with the transfer and storage business on a national basis; that is, coast to coast? A. Oh, yes.

Q. I'm showing you Plaintiff's Exhibit No. 1 as attached to its complaint, which illustrates a mark, and ask you if you are familiar with that?

A. Oh, yes.

Q. Will you tell me all that stands for?

A. That is their trademark, the National Van Lines.

Q. What is the outstanding thing about that?

A. That is.

Q. You are pointing to the vertical stripes?

A. Yes.

Q. And what else?

A. The National Van Lines there.

Mr. Van Sciver: Excuse me. I believe the wit-

Plaintiff's Exhibit No. 52—(Continued)

(Deposition of Joseph S. Ross.)

ness is pointing—I don't like you to put words in his mouth. Maybe you would ask what he was pointing at?

Mr. Groen: Yes.

Q. What were you pointing to?

A. I was pointing to the National Van Lines and this emblem.

Q. What is that emblem?

A. This is a striped emblem, red and white.

Q. And this appears to be black and white on this print? A. That's right.

Q. How long have you been familiar with that mark there, say the words and striped design?

A. I think since, oh, 20 years I know of. I think since about 1930.

Q. I'm speaking of the one for the National Van Lines, the plaintiff in this case?

A. Yes.

Q. And you are speaking of knowing about this for 20 years?

A. Yes, 20 years. I have known this firm and did business with them.

Q. Would you say it is a rather popular mark in your business?

Mr. Van Sciver: I object to that.

Mr. Groen: Let me rephrase the question:

Q. Is this mark well known in the trade today?

A. That's right, it is.

Q. Do you know of any other marks in the moving and storage business—this particular business—

Plaintiff's Exhibit No. 52—(Continued)

(Deposition of Joseph S. Ross.)

that combine the word National with the vertical stripes? A. No, I don't.

Q. Have you seen anything like that lately?

A. Only on the National Van Lines.

Q. Now, in all your work in this field of moving and storage, which you say has been about 25 years in the various parts of the country, you don't know of anyone having used that combination?

A. I don't know of any, no.

Mr. Van Sciver: Objection as leading.

Mr. Groen: Q. Well, have you ever seen anyone use the word National and the vertical stripes together? A. No, sir.

Q. Now, I'm showing you Exhibit No. 4, for plaintiff, attached to the amended complaint, which is another insignia or mark, National Transfer & Storage. Have you ever seen that before?

A. No, sir.

Q. Does it look familiar to you?

A. No, it looks to me like——

Mr. Van Sciver: No, he said he never has seen it.

Mr. Groen: Q. Does it remind you of any marks?

A. No. The only one I know is the National Van Lines.

Q. Would you say that, in your opinion, based on your work in this field, it looks close to that of National Van Lines.

Mr. Van Sciver: Objection.

Mr. Groen: His opinion.

Plaintiff's Exhibit No. 52—(Continued)
(Deposition of Joseph S. Ross.)

Mr. Van Sciver: He is not qualified as an expert.

Mr. Groen: I think the record shows he has been in the moving and storage business for 25 years, and he is familiar with the various organizations in the transfer and storage business, and I am asking him, based on that, whether in his opinion he believes—

Q. If there is any similarity between the two marks, Exhibit No. 1 of the complaint and Exhibit No. 4 of the amended complaint?

A. Had I seen it, probably it would. It would confuse you a little bit, you know, but all I know is the National Van Lines using it. I have never seen it before.

Mr. Van Sciver: I move to strike the answer and the question.

Mr. Groen: You may cross examine.

Cross Examination

By Mr. Van Sciver:

Q. Mr. Ross, you have testified that you had seen the trademark shown in Plaintiff's Exhibit No. 1 since around 1930?

A. That's right, correct.

Q. You will note that this registration, which is an official document put out by the United States Government Patent Office—

A. Yes.

Q. —contains in the last paragraph, the state-

Plaintiff's Exhibit No. 52—(Continued)

(Deposition of Joseph S. Ross.)

ment of the first use of this mark. Do you notice that? A. Yes, sure.

Q. And what year does it say it was used first?

A. It says here 1934, but they used it prior to that. That is the way I remember.

Q. I show you a page from a—also happens to be an official publication of the United States Government, and, incidentally, I would like to offer this if I—

Mr. Groen?

Mr. Groen: Yes, that is perfectly all right.

Mr. Van Sciver: That is Defendant's Deposition Exhibit No. 1.

Q. You will notice in the lower right-hand corner there is a National Van Lines, Inc. without the shield shown in Plaintiff's Exhibit No. 1, correct?

A. That is correct, sir.

Q. Did you ever see that mark used without the shield?

A. No, I don't remember that. That's so far back that I can't remember it exactly, no.

Q. Now, you say that you were in the moving and storage business and your own business for about 25 years, but prior to that time, you worked for Continental Van Lines?

A. That's right, prior to 1933 I worked for—I started our own business about 1933.

Q. And how long had you worked for Continental?

A. About 3 or 4 years, something like that. I

Plaintiff's Exhibit No. 52—(Continued)

(Deposition of Joseph S. Ross.)

don't remember exactly—you know—to be correct on that. That is so far back that sometimes you——

Q. I understand.

A. It is a year one way or the other, you just can't come right out.

Q. Well, were you in the moving and storage business prior to the time you worked for Continental? A. No, I wasn't.

Q. What business were you in before that?

A. Well, I was a salesman and on the road—traveled.

Q. In what territory?

A. All over the country.

Q. Where were your headquarters?

A. In New York City—New York, Philadelphia.

Q. I think you said when you were with Continental, you were in Philadelphia?

A. No, I was in Chicago. I started in Philadelphia for them—they were a Philadelphia concern—and then they asked me to transfer to Chicago, and take charge of their office here. That's how I became acquainted with Mr. McKee of the National Van Lines, and I don't know whether you are familiar with this business, but although I was in the Continental, and sometimes we would get loads where we don't have a truck that has to be dispatched, wherever the destination is supposed to be, and we will get orders from the office, "See if you can't dispose of it with other carriers who go in that territory," and I used to go to McKee and

Plaintiff's Exhibit No. 52—(Continued)

(Deposition of Joseph S. Ross.)

sell him loads. In our line of business, we call that, "to broker it."

Q. You have been in the business then since around 1929, is that correct?

A. No, about—around that, yes, probably around 1929, 1930, I don't remember exactly. 1929? It probably is that long.

Q. Was it before the depression? Before the stock market crash?

A. As it happened, I came into the depression—that is what put me in the moving business. The depression made me move so much, I figured it was cheaper to go into the business. I fooled them.

Q. At the time that you went into this business, you knew, as a fact, did you not, that there were many, many companies, other than in the trucking business, perhaps, which used the name National in their firm name?

Mr. Groen: Just a moment. I want to enter an objection in the record that this is irrelevant, beyond the scope of the direct.

Mr. Van Sciver: Q. Go ahead.

A. Not in the moving business.

Q. No, I said in any business—other businesses you knew—there were many businesses uses the word National?

A. Freight business. I don't remember that.

Q. Other than the moving and freight business?

A. All I was interested in—I really don't know

Plaintiff's Exhibit No. 52—(Continued)
(Deposition of Joseph S. Ross.)
outside the moving business. There was probably, but I don't remember.

Q. Do you remember National Dairy Company of New York?

A. No, I don't really know.

Q. National Transit Company in Washington?

A. National Transit in Washington? No. There was a National Delivery in Washington.

Q. When was that?

A. That was about the time—oh, it was in 1929. Sure. Morris—what was his name? National Delivery, yes.

Q. That was in Washington in 1929?

A. Yes. Prior to that. I think they started in 1925, if I am not mistaken. National Delivery.

Q. What was their business?

A. Moving household goods.

Q. Are you familiar with the shield that is used by the Union Pacific Railroad?

A. Yes. I have seen it on the Union Pacific matters going out of Omaha. I traveled on the trains.

Q. Isn't that a shield that is in the shape of the shield shown in Plaintiff's Exhibit No. 1?

A. Well, Mr. Van Sciver, if I am correct, they are black and yellow.

Q. What are the stripes, yellow and red?

A. Or yellow and red. I wasn't sure.

Q. And the configuration of the shield, is that substantially the same?

Plaintiff's Exhibit No. 52—(Continued)

(Deposition of Joseph S. Ross.)

A. I wouldn't want to say that.

Q. It is a shield?

A. It is a shield, oh, yes.

Q. Are you familiar with the shield of the United States Olympic Committee?

A. Yes.

Q. It is similar to the shield of the one in Plaintiff's Exhibit No. 1, too, is it not?

A. I don't remember exactly.

Q. Do you remember it as red and white stripes—vertical stripes?

A. Maybe. I don't remember. I don't remember that so well.

Q. Are you familiar with the shield of the President of the United States? A. Oh, yes.

Q. It is similar to the shield shown in Plaintiff's Exhibit No. 1, is it not? A. Yes.

Q. It likewise has vertical red and white stripes, has it not? A. Yes.

Q. It is a fact, is it not, that in your business many companies use a map of the United States in their advertising?

Mr. Groen: Object to the question again as irrelevant. The map is not an issue.

Mr. Van Sciver: You may go ahead and answer.

A. Yes, some use a map.

Mr. Van Sciver: Q. Of the United States?

A. Of the United States.

Q. Do some of them use it in telephone classified directory advertising, to your recollection?

Plaintiff's Exhibit No. 52—(Continued)
(Deposition of Joseph S. Ross.)

A. I think—I would say yes. I haven't seen any lately, I will tell you.

Q. Well, just to refresh your memory, we will show you here, Defendant's Deposition Exhibit No. 3, which is a 1953—December, 1953—Chicago Classified Directory.

A. The Red Book, yes.

Q. In 3-C of that exhibit, do you find a map of the United States here? A. Calders.

Q. C-a-l-d-e-r-s. And on 3-D, do you find there the phrase, "Local and nationwide padded van service"?

A. Well, that is very common. It has been used in lots of advertising—nationwide.

Q. Nationwide?

A. For Knowles, yes.

Q. And on 3-E, you will find a map of the United States for Jensen? A. Yes.

Q. So, after looking at this, it is true, is it not, that the United States map is used quite frequently in your business as an advertising symbol?

A. Yes, I would say it is. Mr. Van Sciver, a good many of them use anything. Here is mine.

Q. Yours itself has a map of the United States, does it not?

A. I don't think so, not the Union Van Line.

Q. Also referring to page 2019, which is Exhibit 3-H, under trucking, there are several national companies you saw—with national in their name—are there not?

Plaintiff's Exhibit No. 52—(Continued)

(Deposition of Joseph S. Ross.)

A. That's National Cartage. They are not in the moving business.

Q. National Freight Lines, also?

A. They are not in the moving business, of course—National Freight Lines. National Produce. Well, there's a lot of them use National.

Q. It is a fairly common name?

A. Common name.

Q. Did you ever hear of a company by the name of National Van Lines operating out of Milwaukee?

A. Yes.

Q. That has no connection with the Plaintiff here, correct? A. No, sir.

Q. When did you first hear of that company?

A. I would say I know National Van of Milwaukee about—also over 20 years. Yes. About—Abe Mechanic—I know him, I would say, about, over 20 years.

Q. Did you know that company when you started your business in 1933?

A. Yes, I did. He was sort of an agent for us, you know. He gives some business. I know him very well.

Q. Did you know of the company prior to 1933?

A. Well, the only one is National Delivery of Washington, D.C.

Q. No, I mean, did you know of National Van Lines of Milwaukee, prior to 1933?

A. No, I did not.

Plaintiff's Exhibit No. 52—(Continued)

(Deposition of Joseph S. Ross.)

Q. It was when you got into the business you knew of them?

A. Yes, when you get around.

Q. Did you know a company by the name of National Carloading Corporation?

A. National Carloading? Yes. Jensen's.

Q. How far back did you know of them?

A. I have known of them quite some time.

Q. At the time you entered the business?

A. Yes.

Q. Before you entered the business?

A. No. I had no occasion.

Q. When I say, "You entered the business," I am talking about when you started your company.

A. Well, then I knew them. I would say about 20 years, something like that.

Q. Did you know them prior to 1933 when you started your company?

A. I heard of them. I did not know them.

Q. Did you know of a company by the name of National Moving and Warehouse Corporation in New York? A. Yes, sir.

Q. Did you know of them before 1933?

A. Oh, yes, but they were then known as National—I don't remember. I knew them very well. I know them now, too. National Van Lines of New York.

Q. No, the name is National Moving and Warehouse Corporation.

A. I think they have been in business—he was

Plaintiff's Exhibit No. 52—(Continued)

(Deposition of Joseph S. Ross.)

under a different name, but I think he has been in the business now 12 or 14 years, something like that.

Q. Did you know of a company by the name of National Trailer Convoy, Inc., operating out of Oklahoma? A. No, sir.

Q. National Freight, Inc. out of New Jersey?

A. No, sir, I did not.

Q. National Truck Company out of Florida?

A. No, sir.

Q. Did you ever hear of a company by the name of National Shippers and Movers, Inc. in Chicago?

A. National Shippers and Movers—and Movers—you say, in Chicago?

Q. Is your answer no?

A. No, I don't know of National Shippers and Movers. I never——

Q. Isn't it a fact that the plaintiff here, the National Van Lines, Inc. at one time used that name? A. I don't remember that, sir.

Q. You don't remember that? A. No.

Mr. Van Sciver: That's all.

Mr. Groen: Just one question, Mr. Ross:

Q. You testified about other firms in the furniture moving and storage business that at one time or other — maybe presently — have used the name National in connection with their corporate name. Now, forgetting National Van Lines, the plaintiff, and National Transfer & Storage, the defendant in

Plaintiff's Exhibit No. 52—(Continued)

(Deposition of Joseph S. Ross.)

this case, do you know of any other companies that use the vertical stripes along with national?

A. No, sir.

Mr. Groen: That's all.

State of Illinois,
County of Cook—ss:

I, J. H. Catellani, a notary public duly commissioned and qualified in and for the County of Cook, State of Illinois, do hereby certify that pursuant to the notice hereto annexed, there came before me on the 2nd day of December, 1954, at 2:45 o'clock p.m., at Suite 1604, 38 South Dearborn Street, in the City of Chicago, Illinois, the following named person, to-wit Joseph S. Ross, who was by me duly sworn to testify to the truth and nothing but the truth of his knowledge touching and concerning the matters in controversy in this cause; that he was thereupon carefully examined upon his oath and his examination reduced to writing by me; that the deposition is a true record of the testimony given by the witness.

I further certify that I am neither attorney or counsel for, nor related to or employed by, any of the parties to the action in which this deposition is taken, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

ALFRED EDWARD DEAN

the defendant herein, called as a witness on behalf of the plaintiff, having been first duly sworn, deposed and testified as follows:

Direct Examination

By Mr. Groen:

Q. State your full name and address, Mr. Dean.

A. Alfred Edward Dean, 1505 Via Montemar, Palos Verdes Estates, California.

Q. Your occupation? A. Executive.

Q. In what?

A. In the moving and storage business.

Q. In what capacity? Will you explain that more fully?

A. Well, just general administrative capacity of my business.

Q. What moving and storage business?

A. Dean Van Lines and/or National Transfer & Storage Co.

Q. You say Dean Van Lines and/or National Transfer & Storage Co. Is that a corporation?

A. No, it is not. It is an individual ownership.

Q. Who is the owner? A. Myself.

Q. When was this business as you identify it now first established? A. October 1944.

Q. Under what name?

A. Originally under the name of National Van & Storage, and subsequently under the name of National Transfer & Storage, and then lastly under

Plaintiff's Exhibit No. 54—(Continued)

(Deposition of Alfred Edward Dean.)

the name of Dean Van Lines and/or National Transfer & Storage.

Q. Let's get this straight. In 1944 your business was first organized? A. That is right.

Q. The first name you used was National—

A. Van & Storage.

Q. How long did you use that?

A. Oh, I don't recall exactly. Not too long.

Q. Would you say it was over a year or was it months, or what?

A. Oh, I would hazard a guess, possibly a year.

Q. What was the next name?

A. National Transfer & Storage.

Q. Company, Co.? A. Yes.

Q. When did you start using that name?

A. About the same time, I think.

Q. You used two names?

A. No, used the one. We discontinued using the Van & Storage at the time we began using the name "National Transfer & Storage."

Q. And you are still using "National Transfer & Storage" today? A. That is right.

Q. What was the other name you said you were using? A. Dean Van Lines.

Q. How long have you been using that and when did you first adopt it?

A. Oh, there again I don't have the exact dates. I would have to refer to the records, but I would say I have been using it for approximately a year or year and a half.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Q. Did you enter into a contract with National Van Lines, Inc., on or about November 7, 1944, to act as their agent in the transfer and storage business?

A. I don't recall the exact date. I did enter into an agency agreement with them, yes.

Q. Did you ever see the Agreement that was attached to the Complaint in this case, a copy of the Agreement?

A. I don't recall.

Q. Was any change made in your name at the time you entered into this agreement, which was on or about December, or November 7, 1944?

A. Well, it was the document itself, I am referring to the agency agreement itself, that prompted me to change my name to "Transfer & Storage" from "Van & Storage," and I remember doing it to try to avoid any possible similarity of names.

Q. You started out as National Van & Storage?

A. That is right.

Q. You changed to National Transfer & Storage. Did that change take place before or after?

A. It took place after we had executed this agreement.

Q. In connection with the display of that name, when did you first adopt the insignia which is illustrated by Plaintiff's Exhibit 4, which I am showing you, attached to the Complaint?

A. There again it would be a guess. I think about 1950 or '51.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Q. 1950 or '51? A. Yes.

Q. When you first started using that insignia, which comprises alternate red and white stripes in the original, which show as black and white here, were you then an agent of the National Van Lines, Inc.?

A. I don't recall. I don't believe so.

Q. Would your records show that?

A. I think the records would, yes.

Q. Have you records to show when you first used this design, with that trade name and design? I am speaking of the design comprising the outline with the stripes.

A. I think so. I think we have probably duplicate records.

Q. What was the occasion for adopting this design along with the name?

A. Oh, my feeling that it had a lot of trade-mark value, and I think that practically every company has some sort of trade-mark to identify their service.

Q. Are you speaking now of the design trade-mark alone or with the name?

A. I am speaking of the trade-mark, yes.

Q. I was solely referring to the character of the two designs or shields. I am questioning you with respect to that.

A. The design, I didn't change the design. I just now answered that.

Plaintiff's Exhibit No. 54—(Continued)

(Deposition of Alfred Edward Dean.)

Q. You adopted the design comprising stripes about 1950 or 1951, you said?

A. That is right.

Q. Would your records show certainly when you did that? A. I think so.

Q. You are using it today? A. Yes.

Q. I am referring to the alternate stripes, that you are using, red and white vertical?

A. That is right.

Q. In other words, you haven't changed the mark? A. Not a bit.

Q. What is the scope of your operations? Do you operate in all 48 states or——

A. No. I have a certificate or authority to operate in the State of California direct. I have the ability to operate in all 48 states through interline.

Q. What is interline? Is that an affiliate?

A. Joint carriage with other carriers that have the authority I lack.

Q. Is interline the name of a company?

A. Interline is the exchange of traffic between two carriers.

Q. And where do you maintain an office or offices?

A. I maintain several offices, and I maintain offices up and down the coast.

Q. Will you name the several cities where you maintain offices?

A. San Diego, Santa Ana, Los Angeles, Para-

Plaintiff's Exhibit No. 54—(Continued)

(Deposition of Alfred Edward Dean.)

mount, California, Monterey, Seaside, California, Oakland, Sacramento.

Q. Is that all? A. That covers it.

Q. And they are all in California?

A. That is right.

Q. Paso Robles?

A. Well, we did have an office there. We discontinued that.

Q. Now, these offices that you just mentioned in the various cities in California, do they all go under the name "National Transfer & Storage"?

A. They do. They go under the name of "Dean Van Lines and/or National Transfer & Storage."

Q. Do you have both names on each office?

A. Yes, sir, I have both names.

Q. What do you have on your trucks?

A. I have one or the other of them.

Q. You don't have them both on?

A. In some instances, yes.

Q. Do you display them with equal prominence then? A. Sometimes, yes.

Q. Do you have them in one line or one over the other, or what?

A. Well, we may have the name of "National Transfer & Storage" on the tractor and "Dean Van Lines" on the trailer, but I can't tell you what percentage one bears to the other.

Q. Do you use the shield trade-mark with the vertical stripes on all of the Dean Van & Storage?

Plaintiff's Exhibit No. 54—(Continued)

(Deposition of Alfred Edward Dean.)

Mr. Von Herzen: Pardon me. What shield is this?

Mr. Groen: I mean the map.

Mr. Von Herzen: You don't mean the shield. You mean the map, don't you?

The Witness: I mean the map of the United States.

Q. By Mr. Groen: And you use that at all times? A. At all times, yes.

Q. That is the same way you use the "National Van & Storage" on the trucks?

A. "National Transfer & Storage."

Q. Or "Dean Transfer & Storage"?

A. "Dean Van Lines." I think you are confused there.

Q. It is all very confusing.

A. "Dean Van Lines and/or National Transfer & Storage."

Q. This letterhead I am showing you, is that, too, in use?

A. No. We are using a new letterhead bearing the name "Dean Van Lines."

Q. Through what channels do you advertise?

A. The telephone books, newspaper advertising, radio, television.

Q. Where is that carried on? Is it carried on outside of the State of California?

A. No, it is not.

Q. And you said in the telephone books, news-

Plaintiff's Exhibit No. 54—(Continued)

(Deposition of Alfred Edward Dean.)

paper, radio, television. Is that in any one concentrated area or in several?

A. Well, in several. It will vary. I mean in some we may have only the telephone or classified advertising that appears in the telephone book which is handed out to subscribers for the particular area we are operating.

Q. Where do you personally maintain your office?
A. Here in Los Angeles.

Q. That is the home office from which you operate?

A. No, it is not. The home office is San Diego.

Q. But you personally stay in Los Angeles.

A. Yes.

Q. I am showing you a page from a telephone directory—

Mr. Turrentine: May I see it, counsel?

Mr. Groen: I was going to show it to him first, but that's all right. This is from the San Francisco directory.

Q. By Mr. Groen: This is from the San Francisco directory, and I refer you to page 485 under the caption of "Moving," and will ask you whether the quarter-page advertisement on the lower right-hand corner is that of your firm or your company.

A. Yes, sir, I think it is.

Q. And is it a typical way of your advertising.?

A. In this particular instance it happens to be, yes.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Q. And that appears in the current directories, does it? A. That is right.

Mr. Turrentine: Pardon me, counsel. You mean, I suppose, whether or not that is in the current directory?

Mr. Groen: Yes.

Mr. Turrentine: Wasn't it taken out of the directory?

Mr. Groen: I just took it out of a directory in my hotel room in San Francisco on Saturday, June 12th.

Mr. Turrentine: We will stipulate to it, of course, if it is.

Mr. Groen: I will ask the reporter to mark the page just identified by the witness as Plaintiff's Dean Exhibit A.

(The page referred to was marked Plaintiff's Dean Exhibit A, and is attached hereto and made a part hereof.)

[See page 493.]

Q. By Mr. Groen: Have you let your advertising for the classified directory in the San Francisco area or the San Francisco directory, for the coming directory? A. I have.

Q. Has there been any change in the ad from what this is? A. Yes, that is right.

Q. In what respect is that changed?

A. We will now use the name "Dean Van Lines."

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Q. Is there anything in there that says "National Transfer & Storage"?

A. Oh, yes, we always have that on this, in all of them.

Q. The same way?

A. Yes, the same way, "Also Known As."

Q. You are going to use both?

A. That is right.

Q. That is the way it will appear in the next directory? A. That is correct.

Q. Now, I am showing you the 1954 Business Directory and Maps, also entitled "Official Blue Book," for San Diego and surrounding territories, and call your attention particularly to page 136, and ask whether the advertisement appearing on that page, or the bottom portion of the page, "Dean Van Lines," is your advertisement.

A. May I take a look at it?

Q. Yes. A. Yes.

Q. Also the advertisement on the top of the page, on the right-hand side, is the "National Transfer & Storage," with the stripe design?

A. Yes.

Q. That is yours? A. Yes.

Q. That is their current directory for this present business, is it not? A. Yes.

Q. Is that the way you are advertising in the next telephone directory in the San Diego area?

A. No, it is not. We are merely making refer-

Plaintiff's Exhibit No. 54—(Continued)

(Deposition of Alfred Edward Dean.)

ence to the "National Transfer & Storage" in the fashion indicated, "Also Known As," like this, having a small six-point line down at the bottom part showing the name "National Transfer & Storage."

Q. Are you now using display ads in the classified?

A. I don't recall right now, but I am sure every one is about the same. The men run their own.

Q. Is that typical of the ads being run in the classified directories in the various cities in which you have offices now?

A. Yes, I would say it is.

Q. Their ads have the "Dean Van Lines" and "National Transfer & Storage," and in both instances the stripe design, with the alternate red and white stripes, or black and white as they appear there, of course.

A. We use the name "Dean Van Lines." If we elect to use the name "National Transfer & Storage," we would just as you see it there.

Q. What do you mean you would?

A. Our option.

Q. Wouldn't you say you are using both names all over? A. All over, yes.

Q. You use a design in your "National" ads in a like way? A. Yes.

Mr. Groen: I will have the reporter mark this Plaintiff's Dean Exhibit B.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

(Page 136 of Official Blue Book, 1954 Business Directory and Maps for San Diego, was marked Plaintiff's Dean Exhibit B, and is attached hereto and made a part hereof.)

[See page 494.]

Q. By Mr. Groen: Referring to the current Los Angeles directory, what kind of display do you have in that for the classified section?

A. To my recollection we have got one of each, what the phone company classify as two-column ads similar to the one you have shown me in the San Francisco directory, with "Dean Van Lines" and a reference to "National Transfer & Storage."

Q. Does that have the stripe design in it?

A. Yes.

Q. What about the "National Transfer & Storage," do you have that, also?

A. I don't know. I have to check with my manager and see whether he runs under the "National Transfer & Storage, with the insignia or the trademark.

Q. When does the next directory come out here?

A. I think it is closed in August sometime, isn't it?

Q. I don't know.

A. I couldn't tell you. August, I think.

Q. How long did you work for the plaintiff in this case, National Van Lines, Inc., as their agent?

Plaintiff's Exhibit No. 54—(Continued)

(Deposition of Alfred Edward Dean.)

A. You mean Al Dean or do you mean the National Transfer & Storage Co.?

Q. You said you were in business in 1944.

A. I worked for the company. I worked for National Van Lines—how long was it, Frank? Thirteen years. Thirteen or fourteen years. I think I went with them in about 1938, wasn't it?

Mr. Turrentine: Let's not talk to anyone off the record.

Mr. Groen: I wish that to be on the record. The record will show it.

The Witness: I worked for National Van Lines for approximately 13 years, up to the time of the termination of the agreement in question here.

Mr. Groen: Let the record show that the witness referred to Frank, who is Frank L. McKee, president of the National Van Lines, who is here in the room.

Q. By Mr. Groen: You worked directly for them at one time as one of their employees, is that it?

A. No, I did not. I acted as agent for the company, not under their name. To bring you up to date on that I would have to go into a long history of my experience in the business.

Q. Well, go ahead.

A. I started in business in 1936 here in San Diego under the trade name of "Golden State Van & Storage Company." I continued that operation until 1941, at which time, with a chap by the name

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

of Harris, I formed a corporation known as "Coast Van Lines, Inc."

Then in 1944 I again became an individual doing business as "National Van & Storage Company" in San Diego.

Q. Is that the early part or the latter part of 1944, do you recall? A. October.

Q. Then what?

A. We are up to date now. Pardon me. During all that time, if my memory serves me correctly, I was affiliated with Mr. McKee's company.

Q. During all of what time? From 1944 on?

A. I don't recall whether it was 1938 when we first made an agency tie-up with them, or it was 1937. 1938 or '37, somewhere in there.

Q. The contract which is attached to the Complaint as Exhibit 3 between National Van & Storage Co. and National Van Lines is dated November 7, 1944. Now, you didn't have any contract with them on an agency basis prior to that, did you?

A. Not under this name, no, but I did have under Golden State Van & Storage Company and under Coast Van Lines, Inc.

Q. And you recall that under this contract, which is the contract of November 7, 1944, Exhibit 3, you were permitted to use the name and insignia like National Van Lines, Inc.?

Mr. Turrentine: I suggest you show the contract to Mr. Dean, if you are going to ask any questions about it.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Mr. Groen: I thought he was familiar with it.

Mr. Von Herzen: I am wondering what you are referring to, also, counsel.

Q. By Mr. Groen: I refer you to page 3 of the Agreement, the middle paragraph under "Advertising."

Mr. Von Herzen: Counsel, I will object to the witness answering that question, on the ground that the contract speaks for itself, and it is the entire agreement between the parties.

Mr. Groen: I want to refresh his recollection as to further questions. I know the contract speaks for itself, but he apparently doesn't recall.

Mr. Von Herzen: May I see what you showed him, counsel?

Mr. Groen: Now, will you read the question to the witness?

(The question was read.)

The Witness: The contract contains that agreement.

Q. By Mr. Groen: Well, answer my question.

A. That is it.

Mr. Turrentine: I submit that is an answer. The contract speaks for itself, counsel.

Q. By Mr. Groen: Did you use the name "National" in any way prior to your association with National Van Lines, Inc. as an agent?

A. It was a brand new operation. I mean, that is, the National Transfer & Storage was a brand new operation. I gave birth to it in October of 1944.

Plaintiff's Exhibit No. 54—(Continued)

(Deposition of Alfred Edward Dean.)

Q. But you said you were in business prior to that.

A. Under the two names that I mentioned to you before.

Q. What were those names? Pacific—

A. Golden State. I was in business as a corporation from 1941 up to the time I went into the individual business under the trade name of "Coast Van Lines, Inc."

Q. You were not using the "National"?

A. No. We acted as an agent for National.

Q. And you at no time used the name "National" as a part of your business or trade name except as an agent for National, with the further exception that you have not been serving as an agent since I think it was 1950?

A. Well, I did use the name "National." I had that registered. I had the name "National Van & Storage" registered.

Q. What period are you speaking of now?

A. I am speaking of the period I went in business. I went in business in October 1944.

Q. You were agent for National then?

A. No, I was not.

Q. You just told me that before that you were an agent.

Mr. Turrentine: That is argument.

The Witness: If I signed an agency on November 7th, isn't that correct, I couldn't have been an agent prior to that date.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Mr. Groen: But you told me you were acting as an agent prior to that date.

Mr. Turrentine: Just a moment, counsel. I am objecting to that as argumentative. He said he was in business prior to that as a member of the Coast Vane Lines, which was an agent for National.

The Witness: I was a member of the corporation. I had an interest in it.

Q. By Mr. Groen: I beg your pardon. I was referring to you as an individual.

A. No, I was an individual, then a corporation. This Golden State Van & Storage Company was first a partnership, then an individual, and then I went in a corporation, and then back to my own individual operation.

Q. It is true that you personally or as a member of a corporation did not use the name "National," except during such periods as you were operating as an agent for National Van Lines, Inc.?

A. Well, I used my own name between October or between the time I signed the agency agreement as National Van & Storage. That is a matter of record.

Q. And you were an agent during that time?

A. No.

Q. You say you were not?

A. I could not have been an agent. I mean we signed the agency agreement, didn't we, in November?

Q. But I thought, as I understood you——

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Mr. Von Herzen: Counsel, if you have any other agreement, why don't you produce it?

Mr. Groen: I don't have it here. I was trying to verify the dates there.

Mr. Von Herzen: You say you have no other agreement?

Mr. Groen: No, I don't.

The Witness: No, we operated prior to the time we made the agency agreement, we worked under the name of National Van & Storage.

Q. By Mr. Groen: And didn't you previously state that you operated as their agents also prior to 1944?

A. Well, that was a corporation. I didn't.

Q. Through that corporation?

A. That corporation was agent for them, yes.

Q. Were you with that corporation?

A. I was. I was a stockholder.

Q. Did you know that National Van Lines, Inc. was using the name, that particular name, all that time that you were in this business, either alone as an individual or with the corporation, prior to 1944?

A. I knew that dozens of businesses used that name.

Q. Just answer my specific question. Did you know that National Van Lines, Inc. were operating under that name, "National Van Lines, Inc."?

A. Sure.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Q. Then in 1943 you were operating as a corporation or you were operating a corporation?

A. Well, I had some stock in Coast Van Lines. To the best of my recollection the corporation sold out on or about that time. I don't know the exact date.

Q. Were you the principal stockholder in it?

A. No, I was not the principal stockholder.

Q. Were you working for them?

A. I was the second largest stockholder.

Q. And you were occupied full time with that?

A. Yes.

Q. Referring again to Exhibit 3 of the Agreement that you saw just a moment ago, that is canceled now, is it not? A. Yes.

Q. And it was canceled as of February 20, 1950, was it, to your recollection?

A. To my recollection.

Q. And you have had no direct connection with National Van Lines, Inc., since that time, as agent or otherwise? A. I haven't.

Q. Since your agency with National Van Lines, Inc., was terminated early in 1950, do you recall whether your office received mail or calls, any of your offices received mail or calls, which were properly intended for National Van Lines, Inc.?

A. Not to my recollection.

Q. Would incidents like that be called to your attention by any of your employees?

Plaintiff's Exhibit No. 54—(Continued)

(Deposition of Alfred Edward Dean.)

A. Not necessarily, unless they had to do with operations or policy.

Q. Well, suppose a customer of National Van Lines, Inc. called to inquire about something, either to give an order or complain or check on something, and they called your office, would you know about that? A. Yes.

Q. You would?

A. Yes. I had occasion to come face to face with some of that in the Monterey area.

Q. What was the nature of that type of call?

A. Oh, the business of complaints.

Q. Complaints about National Van Lines?

A. About their service.

Q. What sort of complaints?

A. Oh, late delivery, improper performance.

Q. Those calls came to your office?

A. Yes.

Q. Do you remember one of them?

A. Yes, sir.

Q. Who was that?

A. Mr. Bolger, O. J. Bolger. I think he operates under the name of Consolidated Van & Storage Company as an agent.

Is that true, Frank?

Q. Let's not ask questions. I asked whether you received calls that were really intended for National Van Lines, Inc., and you said yes.

A. Yes.

Q. That case that you apparently were telling

Plaintiff's Exhibit No. 54—(Continued)

(Deposition of Alfred Edward Dean.)

me about apparently involved someone else than National Van Lines, Inc. Tell me the specific case where you received calls for National Van Lines, Inc.

A. I don't have that down in record form.

Q. Has Consolidated an agency for National Van Lines, Inc.? A. I don't know.

Q. From whom would you say you got calls?

A. Oh, from some man, I take it, up in the area; since we were both running goods to the military they would get the companies confused, particularly in that small area.

Q. Did that happen in any other areas?

A. No.

Q. Would you know of any instance where confusion of that nature occurred between National Storage Company and National Van Lines, Inc. in the San Francisco area? A. I don't recall one.

Q. Would incidents of that nature be reported to you by your employees?

A. Not necessarily.

Q. Is Mr. Green one of your employees up there? A. He is.

Q. Was he for past years?

A. Yes. He has been with me for some time.

Q. He never reported to you about incidents of confusion between the two names of the two companies? A. No.

Q. He didn't, and you never inquired about it?

A. No. I had no occasion to.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Q. Would you be surprised if he was involved in several of those instances where he received calls for National Van Lines, Inc., which were made to your office by a customer? You wouldn't be surprised by that?

Mr. Fihe: He is shaking his head in the negative.

Mr. Von Herzen: I thought it was in the positive. I don't know what the question means.

What do you mean, his state of mind?

The Witness: Well, if I may go off the record—

Mr. Von Herzen: No, no.

Q. By Mr. Groen: You would not dispute that it was possible that Mr. Green or other employees in your office in San Francisco received calls that were intended for National Van Lines, Inc.?

A. No.

Mr. Von Herzen: Just a moment. I object to the question and instruct the witness not to answer. It is immaterial, the way the question is being asked. He doesn't know any were received and there is no showing that any ever came to his knowledge, and no showing it ever came to Mr. Green's attention.

Mr. Groen: I ask him whether any had come to his knowledge. He said he didn't know. I asked whether he would say and said it is possible that they occurred, and I asked him then if he would be surprised that such calls had come in to his office. I asked the witness to answer that.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Mr. Von Herzen: I got the impression that he was saying that he didn't know.

The Witness: It has not been brought to my attention, so I don't know, counsel. That is all I can tell you.

Q. By Mr. Groen: You visit your San Francisco office frequently?

A. Oh, infrequently.

Q. You spoke of receiving such calls that you know of. In what office was that, Monterey?

A. Monterey.

Q. Do you know of such incidents, receiving a wrong call or calls intended for National Van Lines, occurring in any other office? A. No.

Q. You don't know of any?

A. I happened to be in Monterey personally, and that is why I can make the statement.

Q. You are in your Los Angeles office continuously, are you not? A. That is right.

Q. Did you in your Los Angeles office ever receive any calls intended for National Van Lines, Inc.? A. Never to my knowledge.

Q. What about mail? Do you receive any mail that is intended for them and addressed for them, which is probably improperly addressed?

A. Not to my knowledge have we had any such incidents.

Q. You said you adopted the insignia comprising alternate red and white stripes along with that name about 19——

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

A. 1950 or '51, to the best of my recollection. I would have to refer.

Q. Was it after the termination of the agency for the National Van Lines, Inc.?

A. I couldn't tell you that.

Q. Would your records show that?

A. I presume so.

Q. What was the reason for adopting the insignia comprising the vertical red and white stripes?

Mr. Von Herzen: Counsel, hasn't that all been gone into? It has been asked twice.

Mr. Groen: I asked him whether he had. I didn't ask him why. Will you instruct the witness not to answer?

Mr. Von Herzen: He has answered. Wait a minute.

Mr. Groen: Will you read the last question, Mr. Reporter?

(The question was read.)

Mr. Turrentine: You may answer.

The Witness: A means to identify our company and service.

Q. By Mr. Groen: Why did you particularly choose alternate red and white stripes in a vertical position?

A. Why? There was no particular reason. We wanted to——

Plaintiff's Exhibit No. 54—(Continued)
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Mr. Von Herzen: You have answered the question.

Mr. Groen: Please let him go on.

Mr. Von Herzen: You don't want that statement of explanation, do you?

Mr. Groen: Yes, I do.

Mr. Von Herzen: That is what you don't want.

Mr. Groen: This is broad discovery, and there is practically no limit to this.

The Witness: Well, to give you the idea now, to take up your time to elaborate——

Q. By Mr. Groen: All right, let's have it.

A. I went to several of my employees to say that I wanted a good-looking insignia, and that a prize would be awarded to anyone that would devise an insignia that would be suitable, we thought was the best for the certain purpose. One of the boys down in San Diego down there dreamed it up. That is all, no particular reason.

Q. What was this man's name?

A. Greiner, John Greiner.

Q. Is he still in your employ?

A. Yes, he is.

Q. He submitted a design like this in sketch form? A. Yes.

Q. He submitted it to you? A. Yes.

Q. You approved it? A. Yes.

Q. I take it that is still in your files?

A. I think so.

Q. Did you ever see National Van Lines, Inc.'s

Plaintiff's Exhibit No. 54—(Continued)

(Deposition of Alfred Edward Dean.)

shield with the vertical red and white lines on it prior to the time that your employee, Mr. Greiner, submitted this design to you?

A. I have seen the design all over the country.

Q. No, did you see the shield with the vertical red and white stripes prior to the time that you——

A. Yes, I did. I knew them for about 13 years and I saw it.

Q. You saw it frequently, did you not?

A. Yes.

Q. Your employee Mr. Greiner saw it, too?

A. Yes.

Q. Did you consider putting the stripes in any other position?

A. Never entered my mind, never gave that any thought even.

Q. Did you give any consideration then with others as to whether you would adopt this design involving stripes of red and white in vertical position?

A. Never gave that any thought.

Q. Did you have any discussion with others other than Mr. Greiner?

A. I might have spoken to my general manager, yes. I might have discussed that with him.

Q. During that discussion did you consider whether you should adopt this or adopt something else?

A. We didn't dwell on that at all.

Q. What was the purpose of your discussion?

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

A. As to whether we should adopt the insignia and use it.

Q. Did you discuss with anybody that National Van Lines had similar insignia with red and white vertical stripes?

A. Never gave any thought to that.

Q. Mr. Greiner didn't say anything?

Mr. Turrentine: Mr. Groen, you want the witness to talk freely, but you are interrupting him now.

Mr. Groen: I don't think I interrupted him.

Mr. Reporter, will you read the answer?

(The answer was read.)

Mr. Turrentine: You see, the witness was continuing his answer and you interrupted him.

The Witness: You are speaking of Mr. Greiner of San Diego, I take it?

Mr. Von Herzen: There is no question before you right now that I know of.

Q. By Mr. Groen: About how many people in your organization participated in this contest to devise a suitable trade-mark design?

A. Not too many. We didn't have too many employees at the time.

Q. How many would you say beyond Mr. Greiner?

A. Oh, possibly eight or ten.

Q. Did they all submit ideas on that?

A. Yes.

Q. And everything was discarded but this?

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

A. That is right.

Q. Did you consider the others that were submitted?

A. We gave them all consideration, yes.

Q. And you did compare this design submitted by Mr. Greiner with the other designs submitted by the other employees?

A. Sure.

Q. What were some of the other designs?

A. Oh, I don't recall offhand.

Q. Did any of the other ones have stripes on them?

A. It seems to me they did, yes.

Q. Vertical?

A. Could have been vertical.

Q. Were they red and white?

A. They could have been red and white.

Q. Then more than one employee submitted the same idea.

A. No, they didn't submit the same idea.

Q. You said they were vertical and they were red and white.

A. I didn't say anything. I said I thought. I don't recall any specifically.

Q. Then you don't know whether they were the same.

A. That is right. I don't know that.

Q. Your shipments go in interstate commerce, do they not, Mr. Dean?

A. Yes.

Q. Your trucks cross state borders?

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

A. Well, no, our trucks don't cross any state borders.

Q. Your agents? A. No.

Q. You operate exclusively in California?

A. That is right.

Q. You never ship outside of the state?

A. Ship a lot outside of the state.

Q. How does it get out of your trucks?

A. Interline.

Q. Do you have trucks under lease to another line? A. I do.

Q. Do they stay within the state or do they go outside of the state?

A. They go all over. The other parties' operating authority.

Q. They are lettered as your trucks nationally?

A. They are lettered as a combination of companies rendering interline service.

Q. And they carry the name of "National" and the shields with the red and white stripe insignia?

A. They carry the name "Dean Van Lines" now.

Q. They do show the name of "National"?

A. They do.

Q. Do those that show "Dean" have the stripe insignia? A. Yes.

Q. I believe you said they used the name "Dean Van Lines" and "National Van & Storage" interchangeably, and sometimes you have two in the same combination, a truck and trailer?

A. That is right.

Plaintiff's Exhibit No. 54—(Continued)

(Deposition of Alfred Edward Dean.)

Q. Those are the type of trucks that you lease to others?

A. Well, they are the same type, yes. They are not in the same service, though.

Q. Do you lease any trucks to Howard Van Lines? A. I do.

Q. And they operate in coast-to-coast commerce?

A. They do.

Q. And those trucks that you have leased bear the name "Dean Van Lines" and the insignia?

A. They do.

Q. And they bear the name "National Transfer & Storage" and the insignia?

A. They might, some of them might.

Q. They very definitely bear that mark?

A. Yes, very decidedly.

Q. And in service from coast to coast?

A. That is right.

Q. And they very likely do today, only with the name "Dean"?

A. No, I don't think they do today.

Q. You don't know?

A. I don't know at this moment. I am pretty certain they don't.

Q. Mr. Dean, will you give us your sales for the period from February 20, 1950 through May 31, 1954, all sales and services rendered, your gross receipts, while you were operating as National Van Lines, Inc.—

Mr. Turrentine: No.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Q. By Mr. Groen: —National Transfer & Storage Co., and for Dean Van Lines.

Mr. Turrentine: Counsel, you didn't ask for that. There are books and records showing that.

Mr. Groen: I will give him time. He can produce them or you can produce them in any periods that are suitable as corresponding to your company's books, you may keep them that way, but I do want a breakdown beginning with February 20, 1950 through May 31, 1954.

The Witness: I will give them to you for any period you want.

Mr. Groen: For all business done, your gross receipts for the period, business under those two names.

The Witness: No problem at all.

Mr. Groen: When can you furnish that?

Mr. Turrentine: We will have to have a matter of a couple of weeks for that, counsel.

Mr. Groen: I was wondering whether it could be submitted to the reporter and included in the deposition.

Mr. Von Herzen: Let me make this suggestion: We can see that perhaps the matter is going to require us to take Mr. McKee's deposition.

Mr. Groen: You are entitled to.

Mr. Von Herzen: Well, we know that. Thank you, however.

Mr. Groen: We will cooperate.

Mr. Von Herzen: We have to get the date set

Plaintiff's Exhibit No. 54—(Continued)

(Deposition of Alfred Edward Dean.)

for that, and perhaps the matter can be available at that time, or next month, perhaps.

Mr. Groen: Well, I would like to get it. This case is set for trial in October, is it?

Mr. Von Herzen: What is the date?

Mr. Turrentine: October 26, I believe. In regard to the information you want, counsel, the gross operating revenue for Dean Van Lines, you are referring only to the business received other than from Government contracts.

Mr. Groen: I want everything, everything operating under the name "Dean Van Lines" and the insignia and "National Transfer & Storage" with the insignia, from February 1950 on through May 31st.

Mr. Turrentine: October 26th at 10:00 a.m.

Mr. Groen: My point is I don't want anything to interfere with the trial, but we want to get to trial in this case and get it settled, and anything you do prior to that time, of course, we will cooperate with. I believe that will be all, but I would just like to look over my record a minute.

There is one more question on this phase.

Q. By Mr. Groen: Mr. Dean, at any time during your association with National Van Lines, Inc. as an agent, either you personally or the corporation for which you were working, did you obtain loans from National Van Lines, Inc.? Did they ever loan you money? A. No.

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

Q. Did you ever obtain any loans from Mr. McKee, Sr., personally?

A. Is that relevant to this?

Mr. Von Herzen: Is that a matter of concern here?

Mr. Turrentine: I don't believe it is a matter of concern. I will instruct the witness not to answer.

The Witness: I won't answer.

Q. By Mr. Groen: Now, Mr. Dean, I am showing you what purports to be one of a series of circular letters circulated on or about June 15, 1953, under the name "Dean Van Lines," and also says, "Also Known As National Transfer and Storage," and ask if you are familiar with that.

A. Yes.

Q. You recall that that letter was mailed out by your offices? A. It was.

Q. About how many would you say you would guess were sent out?

A. I don't know. I couldn't hazard a guess.

Q. Dozens or hundreds?

A. I couldn't hazard a guess.

Q. But you did put them out amongst people that you did business with?

A. But specifically I don't know who they are.

Q. When you prepared it, who did you prepare it for?

A. We prepared it for the people we intended to have it.

Plaintiff's Exhibit No. 54—(Continued)

(Deposition of Alfred Edward Dean.)

Q. Can you be a little more specific? Who did you intend to have that?

A. That is what I say, I don't know specifically.

Q. You say people. Were they people you do business with? A. More likely, yes.

Q. Would it go to anybody else? Would it go to the people that you were advertising with?

A. No, I don't think so.

Q. Would it go to the trade generally where you might get business?

A. I don't think that kind of publication would reach the trade.

Q. It could? A. Could not.

Mr. Von Herzen: May I see the statement, counsel?

Q. By Mr. Groen: That is your best thought as to who those were sent to?

A. I would think so, yes.

Q. Where did they go out from, what office?

A. San Diego more than likely.

Q. This was prepared under your supervision, you knew about it? A. Yes.

Q. And you authorized its preparation and mailing, and who actually composed this letter? Did you? A. No, I didn't.

Q. You approved it, however?

A. That is right.

Q. You saw it before it went out?

A. I did.

Q. And there is no doubt about it that it went

Plaintiff's Exhibit No. 54—(Continued)
(Deposition of Alfred Edward Dean.)

to the places, at least the places where you got business, where you were doing business in the moving and storage? A. More than likely.

Q. And that would have covered the entire country, would it? A. I don't think so.

Q. Well, don't you do a national business indirectly?

A. No, we don't. We don't attempt to publicize our company nationally.

Q. It really would cover the State of California, certainly, wouldn't it? A. I think it should.

Mr. Groen: I will ask the reporter to mark that letter just identified by the witness as Plaintiff's Dean Exhibit C.

(The circular letter referred to was marked Plaintiff's Dean Exhibit C, and is attached hereto and made a part hereof.)

Plaintiff Dean's Exhibit C

[Letterhead of Dean Van Lines]

June 15, 1953

Important Announcement

This Company is registered and permitted to operate both as Dean Van Lines and National Transfer & Storage Company.

Because so many companies both in the Transportation field and elsewhere, operate under trade names beginning with the word National, we have

Plaintiff's Exhibit No. 54—(Continued)

(Deposition of Alfred Edward Dean.)

experienced difficulties from time to time, due to confusion of similar names.

For practical reasons this Company will therefore conduct all future transactions under the name of Dean Van Lines, and we shall appreciate your changing your records accordingly. There will be no change in management or operating procedure, but merely a shift in emphasis from the name National Transfer & Storage Company to that of Dean Van Lines.

DEAN VAN LINES, Formerly
National Transfer & Storage Co.

Q. By Mr. Groen: I notice, Mr. Dean, this letter now marked Plaintiff's Dean Exhibit C is mimeographed, is it, or is it multigraphed? In other words, it is a mass production job, isn't it?

A. Yes.

Q. And not individually typed.

A. No; that is right.

Q. All of which would indicate that you prepared quite a number of those.

Mr. Turrentine: Just a moment. I think that is a conclusion of counsel, and I instruct the witness not to answer. I think it is immaterial, anyway.

Mr. Groen: Well, I think it is quite material.

Mr. Turrentine: It has been asked and answered. The question has been asked before in substantially the same form as you are asking it, counsel.

Plaintiff's Exhibit No. 54—(Continued)
 (Deposition of Alfred Edward Dean.)

Mr. Groen: No, it has not. I would like to have him tell me about this letter.

Mr. Turrentine: He has told you he doesn't know to begin with, don't know how many went out.

Mr. Groen: I want to refresh his recollection and to have him tell me.

Mr. Turrentine: I still instruct the witness not to answer. If you wish to get an order of court you may.

Mr. Groen: That is all.

Mr. Turrentine: Do you have any questions, Mr. Von Herzen?

We have no further questions.

/s/ ALFRED EDWARD DEAN

Subscribed and sworn to before me this 9th day of December, 1954.

[Seal] /s/ OPAL M. BURROWS,
 Notary Public in and for the County of Los Angeles, State of California.

State of California,
 County of Los Angeles—ss.

I, E. L. Drummond, a Notary Public in and for said Los Angeles County, do hereby certify that the witness in the foregoing deposition named was by me duly sworn to testify the truth, the whole truth and nothing but the truth; that said deposi-

Plaintiff's Exhibit No. 54—(Continued)

(Deposition of Alfred Edward Dean.)

tion was taken at the time and place heretofore mentioned in the annexed Notice, to wit, at Room 725, 453 South Spring Street, in the City of Los Angeles, County of Los Angeles, State of California, on Monday, the 14th day of June, 1954; that said deposition was written down in shorthand by me and thereafter transcribed into typewriting, and I hereby certify that the foregoing 40 pages are a full, true and correct transcript of my said shorthand notes.

I further certify that by stipulation and agreement of counsel, the said deposition may be signed by the witness before any Notary Public.

I further certify that I am not attorney for or relative of either party, or clerk or stenographer of either party or of their respective counsel, or otherwise interested in the event of this suit.

In witness whereof, I have hereunto subscribed my name and affixed my seal of office this 19th day of June, 1954.

[Seal] /s/ E. L. DRUMMOND,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed Dec. 13, 1954.

DEFENDANT'S EXHIBIT E

[Title of District Court and Cause.]

DEPOSITION OF ABRAHAM MECHANIC

taken on behalf of the defendant, pursuant to notice and stipulation under Rules 27 and 30 of the Federal Rules of Civil Procedure, before Edna W. Knueppel, Notary Public, at the offices of Ira Milton Jones, Esq., Suite 714, 110 East Wisconsin Avenue, Milwaukee, Wisconsin, on Wednesday, December 8, 1954, commencing at 11:30 o'clock a.m.

Appearances: On behalf of Plaintiff: Kenneth T. Snow, Esq., 180 North Michigan Ave., Chicago 1, Illinois. On behalf of Defendant: Howard B. Turrentine and C. P. Von Herzen & S. L. Laidig, 453 South Spring Street, Los Angeles 13, California; Mason & Graham, Collins Mason, William R. Graham, 811 West Seventh Street, Los Angeles 17, California; Ira Milton Jones, Esq., by James R. Custin, Esq., 110 East Wisconsin Avenue, Milwaukee, Wisconsin of Counsel. On behalf of Abraham Mechanic: Milton Padway, Esq., 536 West Wisconsin Avenue, Milwaukee, Wisconsin.

(Thereupon the following proceedings were had and testimony taken:)

ABRAHAM MECHANIC

called as a witness herein on behalf of the defendant, being first duly sworn, was examined and testified as follows:

(Deposition of Abraham Mechanic.)

Direct Examination

By Mr. Custin:

Q. Will you please state your full name, and occupation?

A. My full name is Abraham Mechanic; occupation, mover, being president of the moving concern.

Q. You are the president of what concern, please?

A. National Van Lines, a corporation.

Q. That is a corporation?

A. That's correct.

Q. All right. Do you know when National Van Lines was incorporated?

A. Well, offhand no. I think it must have been in '48.

Q. 1948? A. Uh-huh.

Q. That is the best of your recollection?

A. Well, the last time I have gone through the records of the entire corporation papers.

Q. All right. Before that it was a partnership?

A. It has been a partnership between my wife and myself.

Q. And when was it organized as a partnership?

A. Originally, we went in business in 1930.

Q. And under what name did you go into business? A. National Van Lines.

Q. I see. The corporation, then, is the successor to the partnership? A. That's right.

(Deposition of Abraham Mechanic.)

Q. And took over all the business of the partnership? A. That is correct.

Q. You have been doing business continuously under this National Van Lines name?

A. Right.

Q. Since?

A. Never shoved down. Since 1930 telephone was never shoved down.

Q. And never changed the name?

A. Never changed names.

Mr. Custin: I think that covers it.

Any cross-examination?

Mr. Snow: I want to state for the record that we object to all of this testimony as being irrelevant.

No cross.

Mr. Custin: It is stipulated that signature of the witness to the deposition will be waived?

Mr. Snow: I will accept that.

(Which were all the proceedings had and testimony taken in the above-entitled matter at said time.)

Notary Public's Certificate attached.

[Endorsed]: Filed Dec. 13, 1954.

DEFENDANT'S EXHIBIT OO

[Title of District Court and Cause.]

DEPOSITION OF F. L. McKEE

called as a witness on behalf of the defendant, taken on Thursday, July 22, 1954, commencing at 10:00 o'clock, a.m., at Suite 725 Citizens National Bank Building, 453 South Spring Street, Los Angeles, California, before Ross Reynolds, a notary public in and for the County of Los Angeles, State of California.

Appearances: For the Plaintiff: Albert J. Fihe, Esq., 1023 Victory Place, Burbank, California. For the Defendant: C. P. Von Herzen, Esq., 453 South Spring Street, Los Angeles 13, California.

F. L. McKEE

a witness called by the defendant, and being first duly sworn, testified as follows:

Direct Examination

By Mr. Von Herzen:

Q. Will you state your name for the record, Mr. McKee? A. F. L. McKee.

Q. And where do you reside?

A. At 12549 Addison, North Hollywood.

Q. And where is your business, Mr. McKee?

A. At 2431 Irving Park Road, Chicago, Illinois.

Q. What is the name of the concern?

A. National Van Lines, Inc.

Q. And that is incorporated, is it?

A. Yes, sir.

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

Q. You allege in your complaint that it is a corporation organized under the laws of the State of Illinois. A. Right.

Q. That is correct, is it? A. Right.

Q. Do you have some documents with you to indicate the Articles of Incorporation?

A. Yes, sir.

Q. May I see them, please? A. Yes.

Q. Mr. McKee, you have handed me two documents, one of which appears to be a certified copy of Articles of Incorporation of National Van Lines, Inc., the certification bearing date the 20th day of March, 1941, referring to an incorporation of National Van Lines, Inc., and enclosing a photostatic copy of Articles of Incorporation which appear to be dated June 21, 1934, the articles reciting that F. J. McKee, D. W. Johnson, and Watie Johnson, are the incorporators of the concern whose name is National Van Lines, Inc., incorporated under the laws of the State of Illinois to conduct a general furniture-moving and shipping business.

Mr. Von Herzen: May I ask you, Mr. Fihe, instead of attaching this or marking it, will you be willing to let me keep this for a few days so that I can see Mr. Turrentine and show it to him? I am making this suggestion to avoid encumbering the deposition with a lot of these records, and I will return this to you.

Mr. Fihe: Yes; that will be satisfactory.

Mr. Von Herzen: Q. I will describe the next

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

document. You have also handed me a second document, appearing to be a certified copy of an amendment to the Articles of Incorporation of National Van Lines, Inc., the certificate of the Secretary of State of the State of Illinois being dated May 22, 1948, and embracing photostatic copies of amendment to Articles of Incorporation filed May 22, 1948 of the National Van Lines, Inc., appearing to pertain to the shares of stock of the concern.

Mr. McKee, some reference has been made in the complaint to the fact that National Van Lines, Inc. is the successor of a business that existed prior to the time of its incorporation in 1934. What can you tell us about the predecessor of the plaintiff corporation here? Where did it do business first?

A. It was started in Chicago.

Q. By whom?

A. In 1929, by F. J. McKee.

Q. F. J. McKee is who with relation to yourself?

A. My father.

Q. And was that business incorporated?

A. I am not sure. At the moment, I am not sure.

Q. Where did that business have its principal office?

A. In Chicago.

Q. Was it the same address as this concern on the Irving Park Road?

A. No; it was on North Clark Street.

Q. And how did it start its business? Did it have a truck?

A. Yes; a couple of trucks.

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

Q. How long did that obtain? I mean how long did the business continue with a couple of trucks?

A. I would say about two years.

Q. In 1934, when this present plaintiff corporation was organized, how many trucks did it have then? Do you know? To place it in your mind, it was the year after the bank closure in 1933.

A. I wasn't there at the time. I would say about a half a dozen company trucks and then some leased equipment.

Q. Where were you at the time?

A. I was on the West Coast, out here.

Q. And what were you doing?

A. It was the time we had an office at Santa Monica and La Brea in Los Angeles and I was running that office here.

Q. Where you transporting goods between Los Angeles and Chicago?

A. Yes. There were two trucks on a regular run at that time.

Q. This was in 1934?

A. Yes; 1932, 1933, and 1934. There may have been a third truck or a third and fourth truck under lease, if my memory serves me right.

Q. From someone else? A. Yes.

Q. And who did you lease the truck from? Do you remember?

A. It was a fellow by the name of Maury Scott, and there was a fellow by the name of Sweeny, but

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

I don't know whether he made the run out here. I am not sure of the fourth party's name.

Q. You were in charge of the office there at Santa Monica and La Brea, is that right?

A. That is right.

Q. Did you go to New Orleans back in 1934?

A. I did not go to New Orleans. Where does that come in?

Q. I was just wondering about that. You did not go to New Orleans?

A. No. I don't know what you are talking about at the moment.

Q. Where did you go in 1934? Was it a regular run between Los Angeles and Chicago?

A. Do you mean where the trucks went?

Q. Yes.

A. The trucks were going wherever they got loads.

Q. Wherever you could get business, is that right?

A. Yes. Our certificate was non-radial. We could go to and from 39 States and the District of Columbia at that time, including some Western States, California, New Mexico, and Arizona.

Q. Referring to the regular run you mentioned that the two trucks made, what was the regular run, between what termini?

A. Very largely there was a preponderance of West Coast business at that time. That is why I say they were on a regular run. There was a great deal of traffic coming to the Coast.

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

Q. From where?

A. From eastern parts.

Q. Was the regular run predominantly between Chicago and Los Angeles?

A. Well, more than between eastern points and San Francisco or San Diego but to points in California. It could be said that there was more business in connection with Los Angeles than other cities of the State.

Q. Then, you maintained terminals in Chicago on the one hand and in Los Angeles on the other, is that right?

A. We also had a New York terminal.

Q. In 1934? A. In 1934.

Q. Where was that, Mr. McKee?

A. At 1775 Broadway.

Q. How long did you maintain that?

A. We are still maintaining it.

Q. At that same address? A. Yes, sir.

Q. When did it start?

A. I am not sure whether it was opened up before the L. A. office but it was around that time if I remember correctly. I would have to look up records to be sure, as it is a little while ago.

Q. Of these different terminals, you had three in about 1934, I take it, one in New York that you mentioned, one in Chicago that you mentioned, and one in Los Angeles, is that correct?

A. That is right.

Q. Did you have any others?

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

A. No; not at that time.

Q. What terminals do you maintain now?

A. In addition, Washington and Dallas.

Q. Those three first mentioned and Washington and Dallas in addition?

A. That is right.

Q. You have five terminals now altogether?

A. That is right.

Q. Has all the shipping business that you do, the furniture-shipping business, been done under the plaintiff corporation here known as National Van Lines, Inc.?

A. Do you mean was it done by that company alone?

Q. No. I am now asking you whether the shipping business that is tendered to you is handled under or by the plaintiff corporation, National Van Lines, Inc.

A. Would we want to do it any other way?

Q. I don't know. Do you?

A. If the business is handled by the employees of National Van Lines, we do it. Nobody else does it for us.

Q. Do you and your father have any other concern besides National Van Lines, Inc. for furniture moving? A. No; we don't.

Q. You do not? A. No.

Q. Do you do business under any other name?

A. No.

Q. You do not? A. No.

Defendant's Exhibit CO (Continued)
(Deposition of F. L. McKee.)

Q. All business, therefore, I take it, that is tendered you by shippers, is done by this concern, the plaintiff corporation, National Van Lines, Inc., is that right?

A. That is right. We had a concern or a line called National Transfer, but it is not doing any business today.

Q. National Transfer? A. Yes.

Q. When you say "we had", who was that?

A. Dad and myself.

Q. Just the two of you? A. Yes.

Q. Was that separate from National Van Lines, Inc.?
A. That is right.

Q. How long did you operate under the name National Transfer?

A. About two or three years, I would say.

Q. When?

A. Within the last two or three years.

Q. Since 1950? A. Yes.

Q. Was that a corporation or was it a partnership or what?

A. It was a corporation.

Q. And where was that corporation incorporated?
A. In Illinois.

Q. Where did it function? Did it function in California?

A. It was a local operation in Chicago.

Q. A local operation in Chicago?

A. That is right.

Q. It didn't function in California at all?

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

A. No.

Q. Did it do any interstate shipping business?

A. No; it was just a local transfer setup.

Q. What was its complete name?

A. National Transfer Company.

Q. Did it have the word "Company" on it?

A. Company; yes.

Q. You say that has been abandoned?

A. Yes; I think that would be the term.

Q. When did the National Transfer Company as an entity cease doing business?

A. About a year ago.

Q. Do you happen to have the corporate papers of the National Transfer Company?

A. No, sir.

Q. That was incorporated in the State of Illinois, you stated? A. Yes, sir.

Q. Do you know whether or not the corporation has been dissolved or is it still in existence?

A. It is still in existence.

Q. When this corporation, National Van Lines, Inc., was formed, what did you do, Mr. McKee, with the business that was conducted by your father prior to that time?

A. I don't think I understand your question.

Q. When this corporation was formed, what did you do with the business that was conducted by your father before the corporation was formed?

A. All the property of the former company

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

came to National Van Lines and it was National Van Lines from that point on.

Q. And what was the name under which your father operated before National Van Lines?

A. National Shippers and Movers.

Q. Was that your father alone or was it you and your father together?

A. It was my father alone.

Q. Alone? A. Yes.

Q. Was there some sort of a certificate or something of that sort, issued by the State of Illinois, indicating the nature of the business, its ownership and so forth?

A. I don't know much about the National Shippers and Movers.

Q. Did the firm National Shippers and Movers continue either as a name or in any other capacity following the organization of National Van Lines, Inc.? A. No.

Q. It abandoned all of its name at that time, did it?

Mr. Fihe: That is objected to as leading and suggestive and putting an answer in the witness' mouth. You may answer if you can, Mr. McKee, as to whether or not anything was abandoned.

Mr. Von Herzen: I will reframe the question, Mr. Fihe.

Q. The name "National Shippers and Movers" was not used after the incorporation of National Van Lines, Inc., was it?

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

A. Not to my knowledge. The conversion was made as readily as possible.

Q. Is it being used today?

A. No, sir.

Q. Do you know whether that name is actually in use by anyone?

A. No, sir; it isn't.

Q. Going to the time of the incorporation of this concern, do you have some records to indicate the transfer of the assets of National Shippers and Movers to National Van Lines, Inc.?

A. No; I have no records on National Shippers and Movers.

Q. Are there some records of National Van Lines to indicate their taking over the assets of National Shippers and Movers? Do you have any such records?

A. I have no such records here. I don't know whether there are such records that would clearly show it or not. That was twenty years ago.

Q. Aren't there some documents in existence, Mr. McKee, to indicate the transfer of title or transfer of ownership from one concern to the other?

A. There must be, but I wouldn't know where to put my hands on them.

Q. Mr. McKee, if I were to suggest to you that the name "National Shippers and Movers" was continued by your father for several years after incorporating National Van Lines and doing busi-

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

ness under that name, would you say that that was wrong?

A. I wouldn't have any knowledge of it. I would have to see proof of it to consider it.

Q. Where does your father reside?

A. Here in California.

Q. And what is his address?

A. I think 4042 Radford, North Hollywood.

Q. Pretty close to where you live?

A. Yes.

Q. Is he in good health? A. Fair.

Q. Would he be available as a witness?

A. He is 76 years old. I wouldn't want him to be bothered with it, really.

Q. We don't want to create any hardship in the matter at all.

A. He has a heart condition and has high blood pressure and a kidney problem.

Q. That is why I asked you about his health.

A. He is up walking around now, but he doesn't get out much.

Q. Who else in the business would know these facts besides your father? Is there someone else that would know them?

A. If they were very important, I could probably get something from the secretary of the company. What need is there for that information twenty years ago, may I ask?

Q. You will have to leave that to my judgment. Who is the secretary?

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

A. E. C. Johnson.

Q. And is he in Chicago? A. Yes.

Q. Is he any relation to D. W. Johnson?

A. No.

Q. May he be located at your Chicago office?

A. Yes.

Q. Is he there all the time?

A. It is a woman, not a man. She can be located there, yes, at any time.

Q. How long has she been with the concern?

A. Since its incorporation.

Q. In 1934? A. Yes.

Q. Is your father an officer of the company?

A. No.

Q. Is he a director? A. Yes.

Q. In 1934, at or about the time that you incorporated this concern, you submitted tariffs, did you, for the hauling of household goods between various places in the United States, is that right?

A. No. In 1934, there wasn't even Part 2 of the Motor Carrier Act. There was no requirement for the filing of tariffs.

Q. What did you mean when you said you had a certificate in 1934 in 39 States?

A. We didn't have it in 1934. We didn't get that certificate until 1942.

Q. In other words, in 1934, when this business was conducted, there was no certificate whatever, isn't that true?

A. That's right. You got it anywhere.

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

Q. And you did business, is that right?

A. That is right.

Q. Without a certificate?

A. That is right.

Q. And you would take an occasional load perhaps in some city that you might go to just once in ten years, isn't that correct?

A. No, sir. We received our certificate for 39 States and the District of Columbia as a result of having gone to points in those 39 States and the District of Columbia prior to June 1, 1935. So it couldn't have been once in ten years because we only had a couple of years in which to do it and to get that authority.

Q. You submitted, then, your original proof of having been to a certain city in 1935 to the Interstate Commerce Commission, is that right?

A. Right.

Q. And when did you get your certificate?

A. In 1942. I have forgotten the exact date.

Q. Do you have that document with you?

A. No, sir. You didn't ask for it.

Q. I thought I did. Do you have your tariff?

A. Yes, sir.

Q. Will you let me see that, please?

A. Yes, sir.

Q. You have handed me three documents, the first one being a tariff issued by the National Tariff Bureau, under date of April 1, 1941, to be effective May 1, 1949, through one Louis Hobmann of

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

261 Constitution Avenue, Northwest, Washington 1, D.C., the next one being a National Tariff Bureau tariff for the account of National Van Lines, Inc., under date of October 1, 1950, to be effective November 13, 1950, through the same individual, and the third one being a National Tariff Bureau tariff for the account of the persons named on page 3, issued August 25, 1953, to be effective October 1, 1953, through the same individual. I notice on page 3, Mr. McKee, that this tariff is issued for points or between points and places in the United States other than those in Idaho, Montana, Nevada, North Dakota, Oregon, Utah, Vermont, Washington, and Wyoming. Are those the States in which you hold no certificate?

A. At that time, we didn't.

Q. Do you have a certificate in those States now?

A. We have a certificate for the whole 48 States now.

Q. But at the time of the 1949 tariff issuance you did not have it for those States, is that correct?

A. That is correct.

Q. Do I understand, then, Mr. McKee, that, in 1949, you had a certificate for all of the States except the ones that have been just named?

A. Yes, sir.

Q. Did the Interstate Commerce Commission place any restrictions upon your moving of household goods between any points in these 39 States?

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

A. No restrictions.

Q. Mr. McKee, I notice here in Rule 36, and I just happened to glance at it at random, there is a restriction which reads as follows:

“Rates published in the tariff as amended for account of carriers named in paragraph B of this Rule will apply only on joint movements and only on shipments in connection with which National Van Lines, Inc., Chicago, Illinois, is the originating carrier and the carriers named in paragraph B of this Rule, the delivering carrier.”

Did you have certain restrictions in your tariff by which you provided that under certain circumstances the public could only look to you for carrying goods if you were the originating carrier under the rates shown? Would you like to look at this?

A. Yes. I don't recall what that Rule was.

Q. I am looking at page 5, Rule 36, (ADD). I just happened to glance at it.

A. This Rule is made up by National itself and not a rule of the Commission because we file this tariff with the Commission, and we are merely explaining that we will be the originating carrier on movements that would interline with Ford Van Lines or Mollerup, moving in storage, for movements beyond our authority. This was before we had an addition to our certificate.

Q. When did you get that addition to your cer-

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

tificate? I think I asked you that, but I can't now recall.

A. I think, if I am correct about the date, we received the certificate on or about May 2, 1952 or May 1st, around there.

Q. Would your certificates from the Interstate Commerce Commission that you obtained in 1942, and amendments, enlargements, and modifications, be in Chicago or would they be here?

A. They are hanging on the wall in the Chicago office.

Q. Those are probably certified copies, are they not?

A. Those are the originals that the Commission issued to the company.

Q. You don't have them here anyhow, do you?

A. No, sir. As I say, you didn't ask for them.

Q. I think perhaps I used the word "tariff" when I had in mind the certificates as well and I didn't use the word "certificates".

A. The date of the second certificate might be 1950. I don't think that it was ten years after the other certificate. I think it might have been 1950, but I am not sure.

Q. Mr. McKee, does your firm hold an intra-state certificate from the State of California for the carriage of household goods? A. Yes, sir.

Q. And what area does that embrace? Let me ask you first, do you hold it as a common carrier in the State of California? A. Yes.

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

Q. Do you have certain routes and termini in that connection?

A. Not for household goods. We have the same certificate that all other established movers have for the State of California.

Q. You have to designate routes for that purpose, do you not?

A. No. I think the certificates state from a point to all points and back to the originating point.

Q. That would be a radial certificate, is that right? A. Yes.

Q. Do you hold such a certificate? Do you have a radial certificate?

A. Yes; if I am not mistaken, we hold an intra-certificate and I believe it is a radial.

Q. And from what point does it radiate?

A. It would be Los Angeles.

Q. Do you have offices elsewhere, than in Los Angeles, in California?

A. No; not at present.

Q. Did you at one time? A. Yes.

Q. Where?

A. We had an office in San Francisco.

Q. How long?

A. Up till a year ago last May.

Q. And how long did you have that office in San Francisco, from that date?

A. I don't remember from what date, but we had it perhaps ten years.

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

Q. Do you know what occasioned the closure of that office?

A. I was having trouble with the personnel in the office and I had no one else to put in. I had no replacements at the time.

Q. Was that this gentleman whose deposition was taken? A. That is right.

Q. What is his name, again?

A. Bob Adams.

Q. Are the California certificates located here, Mr. McKee?

A. I believe so. I haven't seen it myself.

Q. Who would have them?

A. The office manager.

Q. Your office manager here in California?

A. Right.

Q. At what address?

A. 1855 Glendale Boulevard.

Q. And what is that office manager's name?

A. Walter Bock.

Q. I notice, Mr. McKee, in the tariff which you handed me, which is the most recent one, effective October 1, 1953, there is a restriction apparently written in the tariff which reads as follows:

“National Van Lines, Inc., between all points and places in the United States except (a) between points in California on the one hand and, on the other, points in Oregon and Washington; (b) between points in Oregon and Washington.”

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

Is that one of the restrictions that was placed on your certificate?

A. That is right. That was a restriction in the 48-State certificate.

Q. I thought you mentioned to me there were no restrictions in your certificate or is that something that was just overlooked?

A. I don't know how you put the question, but that restriction has always been there.

Q. That is the way it was issued originally?

A. That is right.

Q. And it still obtains?

A. That is right.

Q. So that National Van Lines, Inc. could not, for example, pick up a person's goods in Los Angeles and deliver them to Portland, Oregon, is that right? A. That is right; we could not.

Q. Nor could they pick up goods of a person in San Francisco, for example, and deliver them to Seattle, Washington?

A. That is right.

Q. Nor could you pick up goods in, say, Eugene, Oregon, and deliver them to Tacoma, Washington, could you? A. No, sir; we couldn't.

Q. And that particular business you reject, is that correct? A. Yes; we don't get it.

Q. Do you haul anything other than household goods and I am referring to the National Van Lines, Inc.? A. Yes; new furniture.

Q. When you refer to new furniture, you refer

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

to furniture from a jobber or from a manufacturer, destined for an outlet of some sort?

A. Yes; from a manufacturer to a jobber.

Q. Roughly speaking, about what percentage of your business constitutes new-furniture moving as distinguished from household-goods moving?

A. A very small percentage. I don't know what the figure is.

Q. Roughly, is it less than ten per cent?

A. Yes.

Q. Less than five per cent, do you think?

A. Yes.

Q. So that 90 per cent of your business or more consists of the movement of second-hand household goods either the property of the individual person using the household goods in connection with their home or something of that sort?

Mr. Fihe: I object to the use of the word "second-hand." It intimates something which may be sold by a dealer in used furniture.

Mr. Von Herzen: I have no objection to reframing the question.

A. If you say household goods, that covers it because new furniture is not household goods.

Q. Then, 90 per cent of your business is the moving of household goods, as distinguished from new furniture?

A. That is right, of national account business and Government and C.O.D.

Q. You have mentioned three categories of ship-

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

ments of goods, household goods, national account, Government and C.O.D. Can you explain that for me, please?

A. National account business consists of the movement of household goods of employees being transferred by a commercial house like Sears-Roebuck or Western Electric, and so forth. Government business is the movement of household goods of personnel of the Armed Forces. C.O.D. is the movement of the general public, the household goods of the general public, which is a collect-on-delivery.

Q. An individual householder, in other words?

A. That is right.

Q. Now, as to the first category, the national account business, that is a matter of contract, is it, with the employer like, for example, Sears-Roebuck, is that correct?

A. It is the solicitation of business with a traffic manager of that firm.

Q. Let's take Sears-Roebuck as an example. Your concern is with the solicitation of the traffic manager of Sears-Roebuck? A. Yes.

Q. And that traffic manager may have in charge the necessity of moving some employee from Chicago to Los Angeles, is that right?

A. Yes.

Q. And you solicit that traffic manager for that particular business? A. Yes.

Q. And, if you were successful, you would have a contract or some order of some sort to move that

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

particular employee's household goods from Chicago to Los Angeles, is that right?

A. Yes, sir.

Q. You do considerable of that type of movement of household goods, do you not?

A. We do all we can get.

Q. Let's take Sears-Roebuck as an example. Where does that business originate? Do you solicit that in Chicago or in Los Angeles or at what points?

A. I think that the work of Sears-Roebuck comes out of the Chicago office.

Q. And that is where the solicitation and the arrangement is made, is that correct?

A. Of that particular account; yes.

Q. As to various national concerns, then, you do business with the traffic managers wherever the traffic manager is located, is that correct?

A. Some of the accounts have the work of that locale handled by the traffic department in that locale rather than the main office, in other words, the work from that particular locale.

Q. Do you have any such businesses that give you a contract to move all of their personnel as necessary and as called upon from time to time?

A. No.

Q. You do not? A. No.

Q. Then, each individual move is a separate contractual relationship with the national concern for whom you move the employee, is that right?

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

A. Yes; that is the character of the work as given out.

Q. Can you give us any estimate of the amount of your total business that is done on that national account, only just roughly?

A. No; I can't.

Q. Is it as much as half of your business?

A. No.

Q. Probably less than a third, is that right?

A. I would say yes; that is right.

Q. Let's move to the Government end of the business, Mr. McKee. You mentioned that that was the movement of the individuals that went in the Armed Forces of the United States?

A. Yes, sir.

Q. How is that business handled? Is it by contract, is it by bid or just how does it come to you?

A. That is handled by solicitation.

Q. In what way, Mr. McKee?

A. By contact with the traffic officer of the Base.

Q. Is it by negotiation or is it by bid or do you know?

A. It is by bid in some instances and in others the work is given at tariff. You don't have to bid for it. They give it to you on your tariff.

Q. If it is between points that are named specifically in your tariff, you don't have to bid for it, isn't that right?

A. It depends upon the Base. Some Bases re-

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

quire a bid and others give the work out to whomever they want, at the tariff.

Q. Let's take the Base at Monterey, for example. Do you know how that is handled?

A. The work at Monterey is given out on a Section 22 bid. I believe it is on the rate level of No. 8 tariff.

Q. And, as personnel is to be moved, the carriers are invited to make a bid, isn't that true?

A. No.

Q. You said this was being done up at Monterey—

A. This bid is placed with the transportation office and it remains there for any work that develops in the interim.

Q. And how often do you make that Form 22 bid? It is every year or every six months or how often?

A. You wouldn't change that bid unless competition upset the apple cart and you had to change the bid to compete.

Q. Are there instances where you use other than tariff rates in making a Form 22 bid?

A. Yes, there have been instances.

Q. Is that true, for example, of Monterey?

A. I don't know whether that would pertain to Monterey or not.

Q. Well, what places do you have in mind in that connection?

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

A. Certain Bases might look for a bid other than at some rate level on a mass movement.

Q. Do you have any particular one in mind where that has been done?

A. No; I don't have any particular one in mind.

Q. Name one instance where that has been done?

A. Down in San Diego a few years back, there was a great deal of work going out of there at one time and the carriers were changing their bids. I don't recall any particular instance other than that one that comes to mind.

Q. The one in San Diego was the result of one particular carrier putting in a very low bid, wasn't it? May I suggest to you that was the Ace Van & Storage Company?

A. I don't know who it was, but, as I say, someone has to upset the apple cart and then everyone has to change the bid in order to be competitive, but there was a bad situation in San Diego.

Q. This Government business, up until a few years ago, was a matter of price, was it not?

A. Yes. I think the situation on the Government work has improved of late.

Q. That is in the last three or four years, isn't that true?

A. Yes; I would say in the last year.

Q. About the last year? A. Yes.

Q. Before that it was a question of the traffic officer getting the best possible price for the person whose goods were to be moved, isn't that true?

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

A. That was pretty much the case.

Q. Could you give me some percentage of what share of the household goods moving business, that the National Van Lines does, is Government business of the type we have been talking about?

A. I think it would be somewhere around 35 per cent.

Q. A little over a third, practically?

A. Yes. The national account is much less than a third. Of course, the bulk of the business is C.O.D.

Q. Would the national account amount to as much as 20 per cent?

A. The C.O.D. would run about 60 per cent, I think.

Q. And the Armed Forces perhaps 35 per cent?

A. Yes, and the national account somewhere between 5 and 8 or 10 or somewhere around there.

Q. In the third category you mentioned, the C.O.D., the individual householder, that solicitation is of the individual through means of advertising, telephone directories, and so forth, isn't that correct?

A. Yes.

Q. You also maintain individual solicitors in the urban centers, do you?

A. We maintain salesmen at each of the offices, and my problem up in San Francisco was a salesmen problem. I mean they just were not getting the business.

Mr. Von Herzen: Mr. Fihe, as to these various documents, may we hold these for a few days, as

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

we did with the Articles of Incorporation, and return them to you?

Mr. Fihe: Yes; that will be satisfactory. I might suggest, however, that you return them directly to Mr. McKee.

Mr. Von Herzen: I will do whatever you say.

The Witness: They are Chicago records.

Q. Do you want these returned to Chicago? Supposing I drop them off at your office on Glendale Boulevard.

A. They will see that they get to Chicago.

Q. Now, do you have the reports or copies of the reports that are published by the Public Utilities Commission of the State of California?

A. Which report is that?

Q. That is the annual report of a certificated carrier in California.

A. Yes; I think I have that. I think 1946 is missing from that group.

Q. No; 1946 is here. You have handed me a series of documents bearing the dates 1945 to 1953, inclusive, being the bank and corporation franchise tax returns of National Van Lines, Inc.

In order to identify them, Mr. McKee, I will step over here and just take one figure at random. The 1945 return shows the first item as gross receipts, \$503,737.26; 1946 shows gross receipts of \$638,498.77; 1947 shows gross receipts of \$1,461,844.76; 1948 shows \$2,270,880.69; 1949 shows \$2,513,052.58; 1950 shows \$2,454,341.69; 1951 shows

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

\$2,166,833.93; 1952 shows \$2,655,802.84; 1953 shows \$3,096,521.35. Mr. McKee, are those gross figures shown on those bank and corporation franchise tax returns the figures of the total business of National Van Lines throughout the United States?

A. Yes, sir.

Q. Mr. McKee, these figures would seem to indicate that your business has grown every year.

A. No. One year there you will see quite a drop; in 1949, I think it was.

Q. 1949 and 1950? A. And 1950.

Q. I take it no part of that drop is ascribable to any activities of the defendant in this instant proceeding? It has nothing to do with Mr. Dean or his business, has it?

A. If his business showed a big increase in those years, it might have had a considerable effect. We have no way of knowing how much business is diverted to him. We get an idea from the business that is misdirected to us in the confusion, people that are trying to get hold of him that contacts us, and we feel that the reverse would be true to a much greater extent because of our greater volume to start with.

Q. In the last three years since 1950, the 1951 return shows \$2,166,000; the 1952 return shows \$2,655,000; and the 1953 return shows \$3,096,000, eliminating the hundreds and the cents. All of those returns indicate an increase in business of, roughly, about \$400,000 per year?

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

A. The increase is affected greatly by our putting on more agents in various locales.

Q. You don't claim, do you, that there has been any actual decrease or loss in your business by virtue of Mr. Dean's activities in the years 1953 and 1952, do you?

A. In spite of the increase, we have lost business to him according to the records, according to the deposition of Bob Adams, the office manager at San Francisco, and other records. You might say we are doing that increase in spite of what effect he has on our business.

Q. In other words, there are no losses that can actually be claimed or established by reason of any of Mr. Dean's activities, is that right?

A. As I said before, we don't know how much business he gets of ours because he doesn't tell us. We do know that some of his inquiries come to us and can figure that our inquiries must be going to him to a much greater extent because of the difference in sizes of the two businesses. I mean the confusion is there. We only witness a portion of it, that which comes to us that should have gone to him in the first place. For instance, two weeks ago, we got a crating contract from the Base that was intended for him, but they sent it to us.

Q. The Base where?

A. We don't know how much business he gets of ours because he doesn't tell us. This is Fort MacArthur. And, on June 18, 1954, we returned the

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

crating contract to them and told them, "Returned herewith is a crating bid contract addressed to the National Transfer & Storage, 124 North Center Street, Los Angeles. As you will note, 124 North Center Street was our previous location prior to our removal to our present address in 1953. No doubt this bid was meant for National Transfer & Storage Company, as National Van Lines, Inc. has never applied for any crating contract."

Q. You don't do any crating?

A. No, sir. They were trying to give us his business, misdirecting it to us.

Q. You have a group of those, I take it, is that right, a group of misdirections, the first one of which you read there? Are there some others?

A. That is the only one I have with me. That is very recent. But Bob Adams testified to many complicating cases.

Q. Are there other records besides what Bob Adams testified to? Are there some other records available that would indicate that?

A. Yes. It would be a matter of digging for them and locating the cases. They are in the files.

Q. What would be the records? What form would they take?

A. It would be notations of inquiries that were made wrongfully. It would be more of what Bob Adams was testifying to, bills that were sent to us, claims that came to us, business that had to be re-directed.

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

Q. Who would have those records?

A. They are in the files. It is a question of digging them out.

Q. The files where?

A. Of National Van Lines.

Q. Where? At what place?

A. It would be in the San Francisco files and in the Los Angeles files.

Q. The San Francisco office is no longer there, is it?

A. No; the files were taken back to Chicago.

Q. The files actually, then, are in Chicago now, is that right?

A. Yes; the San Francisco files were transferred to Chicago.

Q. And the Los Angeles files would still be here, would they not?

A. That is right. I think there are also some cases of confusion down in the Dallas office, that we didn't even bring into the case at present.

Q. A good share of the confusion perhaps, if not over 90 per cent of it, relates to governmental jobs, does it not, such as this crating contract that you mentioned and the various government jobs that were mentioned by Mr. Adams?

A. No; I wouldn't say that. The people that have called us and were mistaken in their calls did so through reference to the telephone book, I believe, or that is the impression I got. I don't know how the Base got their confusion but, if you look in

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

the telephone book and turn the pages, you come to "National" and you call and it is the wrong one.

Q. You know, do you not, Mr. McKee, that there are, roughly, twenty or more national transfer companies, national van companies, and national storage companies, in the moving and storing of household goods, that have the word "National" in them, isn't that correct?

A. I don't know what number of lines, whether freight or van lines or just a little local mover, might have the name "National" in connection with their trade name. I haven't found twenty.

Q. Let's say quite a number of them, isn't that true?

A. There is just one foreign company, that is not related to National Van Lines, in the State of California, to my knowledge, at the present time, which is Al Dean's company. There was a small company on the south side that started to use the name and we got them off of it and told them they were going to have trouble if they continued and, as far as I know, they discontinued using it.

Mr. Fihe: The south side of where?

A. Of Los Angeles.

Mr Von Herzen: Q. Do you feel that the word "National" has some advantage in its use as a part of the name of the business?

A. In our case, a 48-State operator, it is a national line in scope and we have had this name since 1929 as "National," considering our prede-

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

cessor. And we have the national colors that we adopted and, to us, it means everything, and in the book the stripes of the emblem are confusing to the trade.

Q. I haven't gotten to the emblem yet. I was just referring to the use of the word "National."

A. As the Base did, they just grabbed the address "124" and sent Al Dean's bid to us. Whether it is laziness on the part of the individual looking for the name or what, I don't know.

Q. In other words, you think that the word "National" may have some advertising advantages that you would like to keep for your company?

A. Well, yes, for this reason, that we have been in business all these years hauling or doing the volume you read off, bringing thousands of people into California, and we want to move them back. We don't want Al Dean to move them for us. And they remember "National." Whether they remember National Van Lines or just the name "National" I don't know, but we want that return load business and want the advantage of all the advertising we have done all of these years.

Q. Do you think the word has some connotation that you are able to go everywhere and deliver goods on a national scale?

A. Yes; this gives it a far more descriptive name than "Allied." That just means a grouping of van lines, but National Van Lines means national in scope.

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

Q. As to the United States? Is that what you have in mind? A. That is right.

Q. As to this emblem you mentioned, that you adopted, the national emblem, you do know, do you not, that that is the emblem of the President of the United States? A. That particular shape?

Q. Yes.

A. No. I was the one who formed the first emblem and I didn't copy it from the President of the United States or from anyone else. It is a national emblem and has a similarity to other emblems, road signs, and what-not.

Q. In other words, the exterior shield shape is the same shape as you find on road signs of the United States?

A. It has a similarity; yes.

Q. Do you know that the red and white stripes are a national emblem adopted by Congress for use of the executive department?

A. No; I am not that well up on my history. I didn't know that.

Q. You do know that it is used quite generally by many, many fields of business, such as the Union Pacific Railroad, for example?

A. Well, the shape of every emblem is a little different. They do have the red stripes and we have no bone to pick with the Union Pacific because it is a railroad line, but we do have a bone to pick with any van lines because of confusion.

Q. When did you adopt that emblem?

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

A. We adopted it, I believe, in 1930.

Q. When you say "We," that would exclude you, would it not?

A. I mean it started with the predecessor, National Shippers and Movers. I say "We" because I am connected with the company.

Q. Was it registered anywhere at that time?

A. No; it was not registered.

Q. Do you have some records with you indicating that it was started in that year or thereabouts? Do you have some of the older records?

A. I believe that Mr. Groen filed some records, on the instigation of this suit, showing freight bills or invoices of that early date with the emblem on them.

Q. It is a fact, is it not, that you had a great deal of your business, your trucks and your letterheads and freight bills and what-not, that did not have that emblem as late as the year 1942?

A. That did not have it?

Q. Right.

A. I wouldn't understand that because I located those old invoices or letterheads for Mr. Groen, and I was quite certain that they went back to that early year that I mentioned, to 1930.

Q. Could it be possible, Mr. McKee, that a share of your printed matter had the emblem and another share did not have?

A. You said as late as 1942, did you? We incorporated in 1934 and the emblem went right on. The

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

new stationery then showed the emblem with "National Van Lines." I can't understand that 1942. I don't know where you get that date. I know that National Shipper and Movers were using it because I supplied the letterheads and the invoices and even pictures of the trucks with "National Shippers and Movers" within the emblem.

Q. All of that now reposes, I suppose, with the Patent Office, is that correct, or does Mr. Groen still have it?

A. He has the original material that I gave him. Whether he gave it back, I don't recall. The Patent Office might have some of it in support of the application. I thought that some of it was attached to the complaint, but I don't remember. I thought you had seen it.

Q. We have certain things that are attached to the complaint. As I understand it, the emblem in the form which you now use it was the form that started in 1930, is that correct?

A. About that date. I am not too good on my dates, but about that date.

Q. But it would be prior to 1934, is that right?

A. Definitely; yes. I was questioning whether it was 1929 or 1930. I would say about 1930.

Q. There are other transfer concerns and storage concerns that use a vertical, alternate red and white striped emblem, do they not, right here in Los Angeles?

A. Yes; there is the American Transfer & Stor-

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

age, or something like that, who are using the emblem, that doesn't have the name "National" in it.

Q. Is that the one that uses the words "Nation-wide" across the emblem, that has the same color and the same shape and the same stripes, and so forth?

A. Yes. They used to be an agent of ours, too. We had the same problem with them that we have with Al Dean.

Q. What about the concern called "Pan American Storage" or "Transfer Company?"

Mr. Fihe: Objection is made to this line of questioning. The actions of third parties are, obviously, not pertinent in a proceeding between the plaintiff and the defendant here.

Mr. Von Herzen: Q. Do you know, Mr. McKee, how long Pan American has used this emblem?

A. I didn't recall Pan American. When you first mentioned just the shield alone, I thought of the American Transfer & Storage. Pan American used to be our agent, too.

Q. When? What year? Do you know?

A. I am not sure of the date. Pan American and American Van Lines were both our agents some years back.

Q. Mr. McKee, with the use of vertical, alternate red and white stripes, assuming that the names of the concerns were different and the word "National"

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

did not appear, do you believe that would be of any considerable significance?

Mr. Fihe: That is objected to. The witness is not qualified here as a trademark expert.

Mr. Von Herzen: Q. In your operating of the business, do you think it would lose you any business?

A. I think with the emblem of American Van Lines and Pan American, if they have it as you say, it is confusing with National Van Lines who have the same emblem. If emblems mean anything, it must be confusing.

Q. What about just the red and white stripes? Do you think you as an operator of the business would lose any business if somebody else used the red and white stripes, if they didn't use the emblem?

Mr. Fihe: The same objection.

Mr. Von Herzen: Q. Can you answer?

Mr. Fihe: Maybe you would like to have the question read back. A. Yes.

(Question read by the reporter.)

A. The vertical red and white stripes?

Mr. Von Herzen: Q. Yes.

A. In some sort of a shape and emblem, would you say?

Q. Yes; the vertical stripes.

A. Any cases with any emblem would be conflicting with National who use vertical red and white stripes in their emblem.

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

Q. But what I asked you is whether or not, as an operator of the business, you think you might lose business by virtue of the red and white stripes being on someone else's emblem that was different in size, shape, and contour.

A. When say confusing, I mean with that goes a loss of business.

Q. You don't really believe you would lose any business by it, do you?

A. If any prospective shipper recalls that National's emblem has red and white stripes and sees an emblem that has red and white stripes and is confused, that business goes to that party.

Q. Mr. McKee, let me ask you this: Do you know of one single instance anywhere, in all of the years you have done business, where a person has taken the business to you or to someone else because they saw vertical red and white stripes and were confused?

Mr. Fihe: That is objected to. As pointed out previously, the witness is not a trademark expert, and it is well-recognized law that it is not necessary to prove actual confusion in cases of this type, but only the possibility of confusion. However, the witness may answer the question if he can.

A. I don't recall any particular case at the moment.

Mr. Von Herzen: Q. Actually, there hasn't been any, has there?

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

A. There could have been many cases, as far as I am concerned.

Q. But you don't know of any, do you?

A. I am not in the sales. My job is the over-all management and our sales managers and our salesmen on the street could know of them and I wouldn't necessarily know of them.

Q. Mr. McKee, prior to your registration of this particular emblem with the Patent Office a year or two ago, along with the name "National Van Lines," was there any registration of that emblem anywhere, either State or federal?

A. No; the registration was more than a year or two ago, but there was no federal registration of it prior to the time that we actually filed it with the Patent Office. It was just common usage of it.

Q. Pardon me; it was 1951 and 1952. It shows that in the complaint. Would you like to see the date?

A. Yes. I have forgotten it.

Q. It is at the top. A. Yes.

Q. And turn the next page. Do you see the date at the top? A. Yes.

Q. Was that emblem registered anywhere, either State or federal, prior to September 11, 1951?

A. Not as a trademark; no. It would be in the files of the State and of the Government and all of our stationery, but no official registration of the emblem itself prior to that date.

Q. What do you mean by "in the files of the Government"?

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

A. I mean that the emblem is on everything we use and has been through the years. So the only registration would be in the paper work, in State papers and federal papers.

Q. Do you mean any letters, for example, addressed to some person that runs a Base or something like that?

A. Yes; somebody in the Government or State. It would just be on the stationery but no official registration of it prior to this date.

Q. Are you acquainted with the fact that Mr. Dean is departing from the use of the word "National" in connection with his transfer and storage business?

A. Yes; I have seen some evidence of that. I checked his sign down at San Diego and some of his vans that I saw on the road. If he would just depart all the way now, we would be happy.

Q. One other thing, Mr. McKee. I will refer you to the contract which is attached to the complaint and entitled "Sales Agent Agreement," and particularly to page 5 thereof, subparagraph (b), which reads, under the title of Termination:

"This agreement may be terminated at any time upon the written request of the sales agent or the written notice of termination by the company, sent registered mail to the last-known address of the sales agent, provided, however, that, upon such termination, the sales agent shall immediately: (a) return to the general office of the company, at his

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

expense, all unusual sales literature and/or signs and/or selling aids and/or company stationery and/or forms and/or data pertaining to company procedure and records."

A. That "date" seems confusing there.

Q. Then, subparagraph (b):

"Discontinue the use of the names 'National Van,' 'National Van Lines' or 'National Van Lines, Inc.,' in any manner whatsoever."

Now, Mr. McKee, referring to those three specific names that are mentioned there, are those all names that were used by you or the plaintiff company at one time or another?

A. No. What we were trying to say there——

Q. No; I am not asking you for your interpretation. I am asking you whether those three names that you mention there specifically are names that your concern used at one time or another?

A. We used the name "National Van Lines, Inc.," and we were just trying to protect "National."

Q. Is there any place in here whatsoever where you have used or required the agent to discontinue the use of the word "National" standing alone?

A. "In any manner whatsoever" was interpreted to be any variation other than those three examples.

Q. You mean that is the interpretation that you want placed on the contract?

A. That is right. That is the interpretation I have always had, that they couldn't use the name

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

to further their business. In fact, we asked for everything to come back to us, advertising and literature and so forth.

Q. Who prepared this contract?

A. I had a hand in it.

Q. And who else?

A. What date is that contract? I conferred with others; I don't remember who.

Q. This is dated November 7, 1944.

A. I don't remember who I conferred with at the time.

Q. Did you have an attorney?

A. No; I didn't on that, I don't believe.

Q. I notice that the agreement appears to be a blank with the names filled in. I take it you had a number of these, did you not?

A. That was our sales agency agreement.

Q. And your company prepared it, is that correct? A. That is right.

Q. Neither Al Dean nor any of the other persons who signed this document had anything to do with the choice of language or the terminology that was used here, did they?

A. Well, I signed it and I had a choice.

Q. I mean the others.

A. No. Do you mean the salesman himself?

Q. Yes. A. No; he had no choice.

Q. He either signed it or didn't, is that right?

A. Unless there were any deletions suggested by Al Dean. I don't know whether there were any

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

alterations of his agreement or not. If no alterations showed, then it was accepted as is. Sometimes the other fellow doesn't accept it in whole.

Q. I call your attention also to this phraseology on page 2 of the agreement, under the title of Use of Company Name, where it says:

"The sales agent agrees that he will not use the name 'National Van,' 'National Van Lines,' National Van Lines, Inc.," or any combination thereof, or the company insignia or company advertising for purposes other than transactions resulting from the sales rights granted herein."

A. Yes; "any combination thereof" to me meant using any part of it in combination with something else.

Q. But that is not what it says, is it?

A. It could be interpreted some other way, I presume.

Mr. Von Herzen: I think that is all with the exception of the Public Utilities Commission reports which a certificated carrier must make. Perhaps these things will substitute. May I return these in the same way, Mr. Fihe?

Mr. Fihe: Yes; and I would suggest that you send them back to Mr. McKee.

Mr. Von Herzen: I will drop them off at the Glendale Boulevard address of the plaintiff concern.

Mr. Fihe: That will be fine if you will do it or have somebody do it for you.

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

Mr. Von Herzen: Let me ask you this: In the event we have to have those Public Utilities reports, would Mr. McKee be available after his return from Chicago for that purpose?

Mr. Fihe: May I speak with him about that?

Mr. Von Herzen: Yes, sir.

(Conference between Mr. Fihe and the witness.)

Mr. Fihe: I will let Mr. McKee answer the question.

A. I have reports here, and I think it is what you are asking for, that go from 1943 to 1954. They are monthly and quarterly reports.

Mr. Von Herzen: Q. I think these are the ones. This is the Board of Equalization?

A. Yes.

Q. This is the non-certificated operation. The Board of Equalization doesn't have jurisdiction over the certificated operation. Only the Public Utilities Commission has jurisdiction over that.

A. I see.

Q. There is a form, about that size, that you have to make up. Maybe they are attached here. Here it is. The pink one is it.

A. Do you want all of the pink ones? Those are the quarterly reports I was referring to. I believe these are based on mileage books and not based on revenue.

Q. Would you be willing to leave these and let me look them over and I will turn them over to you?

Defendant's Exhibit OO (Continued)

(Deposition of F. L. McKee.)

A. Yes; but please keep them in the same way.

.Q I will. I won't change a thing. I think these are the ones.

A. That is all our history, so we will have to get them back.

Mr. Von Herzen: That is all.

Mr. Fihe: No questions. Do you want to waive signature on this deposition?

Mr. Von Herzen: Yes; I will.

The Notary: Mr. McKee, do you waive the reading of and signature to the deposition also?

The Witness: Yes.

State of California,
County of Los Angeles—ss.

I, Ross Reynolds, a notary public in and for said County of Los Angeles and the State of California, do hereby certify:

That prior to being examined the witness in the foregoing deposition, to-wit, F. L. McKee, was by me sworn to testify the truth, the whole truth, and nothing but the truth;

That the said deposition was taken down by me in shorthand at the time and place therein named, and was thereafter reduced to typewriting under my direction, and I hereby certify that the foregoing 51 pages are a full, true, and correct transcript of my said shorthand notes; and I hereby certify that by stipulation and agreement of coun-

Defendant's Exhibit OO (Continued)
(Deposition of F. L. McKee.)

sel and the witness, the reading, correcting and signing of the deposition by the witness were waived.

I further certify that I am not interested in the event of the action.

Witness my hand and seal this 30th day of July, 1954.

[Seal] /s/ ROSS REYNOLDS,
Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed December 8, 1954.

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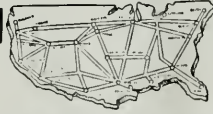


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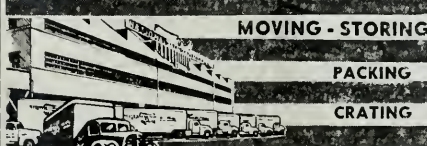
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[Endorsed]: No. 14975. United States Court of Appeals for the Ninth Circuit. National Van Lines, Inc., a corporation, Appellant, vs. Alfred E. Dean, trading under the firm name and style of National Transfer & Storage Co., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: December 15, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14975

NATIONAL VAN LINES, INC.,
Plaintiff-Appellant,
vs.

ALFRED E. DEAN, trading under the firm name
and style of NATIONAL TRANSFER &
STORAGE CO., Defendant-Appellee.

STATEMENT OF POINTS ON APPEAL

Pursuant to the Rules of this Court, particularly Rule 17(6), Appellant submits the following concise statement of points upon which it intends to rely:

1. The lower Court erred in failing to rule upon the validity of appellant's composite mark National with vertical stripes and the registrations therefor.

2. The lower Court erred in failing to find that appellant's registered composite mark, National with vertical stripes, was infringed by appellee's use of the composite mark, National with vertical stripes, both being applied to identical services, namely, moving household goods by motor van.

3. The lower Court erred in failing to take cognizance of the fact that much confusion resulted from Appellee's use of a mark which was for all practical purposes substantially identical to appellant's mark, both used to designate identical services, and that appellant has substantial prior rights.

4. The lower Court erred in failing to find that both appellant and appellee adopted the composite mark National with vertical stripes as a distinctive name or mark to identify their respective businesses, namely, the service of moving household goods by motor van.

5. The lower Court erred in failing to take cognizance of the fact that appellee, who began by using National as his mark without a design, later, when sharp competition developed with appellant, deliberately added a vertical stripe design simulating appellant's composite mark comprising National with vertical stripes.

6. The lower Court erred in admitting evidence offered by appellee as to alleged third party use of similar marks.

7. The lower Court erred in failing to find that appellee, who was once appellant's licensed sales agent, breached the covenants of his license with respect to use of names upon termination of the license.

8. The lower Court erred in failing to award appellant an accounting for damages and profits by reason of appellee's infringement and unfair competition.

Respectfully,

/s/ ALBERT J. FIHE,

/s/ KENNETH T. SNOW,

/s/ GERRIT P. GROEN,

Attorneys for Plaintiff-Appellant

Certificate of Service attached.

[Endorsed]: Filed December 22, 1955. Paul P. O'Brien, Clerk.

